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Sup Court

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 194 19

JOHN SCHRIMPSCHER, SILAS SMITH, ELIZA DAVIS, AMOS CROW, ET AL., PLAINTIFFS IN ERROR,

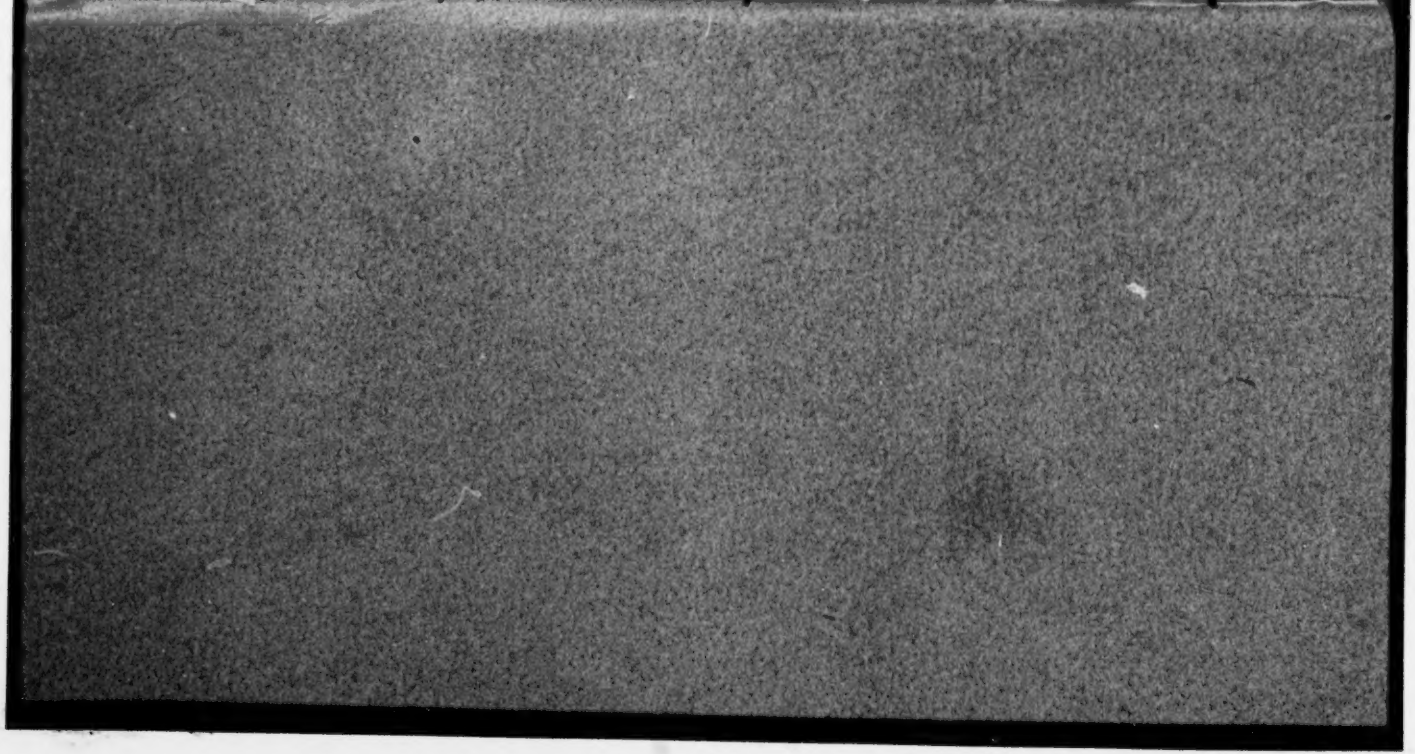
vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED NOVEMBER 11, 1899.

(17,559.)



(17,559.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 154.

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vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 And be it remembered that on the 18th day of May, 1895, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error and a precipe for summons in error, together with a transcript of the record of the court of common pleas of Wyandotte county, Kansas, and which petition in error & precipe & transcript are in words & figures as follows, to wit:

2 EXHIBIT "X."

In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winnie, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Karahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard Splitlog, for Self and as Guardian and Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandotte Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

Petition in Error.

Plaintiff- in error for their petition in error say that in a certain action then pending in the court of common pleas of Wyandotte county, wherein plaintiffs in error were plaintiffs and defendants in error were defendants, said defendants recovered a judgment against these plaintiffs; a full transcript of the proceedings in said court is hereto attached, made part hereof, and marked Exhibit X X; that in said cause the court erred as follows:

Assignment of Error.

1st. The court erred in overruling the motion for judgment on the findings of fact of plaintiffs in error.

2nd. The court erred in overruling the motion for a new trial of plaintiffs in error.

3rd. The court erred in rendering judgment on the findings for defendants in error.

Wherefore plaintiffs in error pray that said errors may be corrected and the judgment reversed and the case remanded to said court for such further proceedings as may be right and proper.

J. M. MASON,
F. E. AND J. A. SMITH,
Att'ys for Pl'ffs in Error.

The clerk will issue summons in error to def'ts in error; Junius W. Jenkins, O. L. Miller, their attorneys of record.

J. A. SMITH.

Filed May 18, 1895.

C. J. BROWN,
Clerk Sup. Court.

 EXHIBIT "X X."

Be it remembered that in the hereinafter-entitled cause, in the hereinafter-named court, the following proceedings were had: That on the 18th day of June, 1892, plaintiffs filed their petition in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMPCHER, SILAS SMITH, ELIZA DAVIS; AMOS Crow, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, Minor, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for Self and as Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandott Indian, Plaintiffs,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSworth, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants.

No. 993.

Petition.

Plaintiffs are the owners in fee and entitled to the immediate possession of the following-described land, in the county of Wyandotte and State of Kansas, to wit: That part of the following-described tract of land which lies east of a north and south line drawn through said hereinafter-described tract eighty-six poles west from and parallel to the east line of —.

Commencing at the center of section 27, township 10, range 25, thence north 64 poles, thence west 160 poles, thence south 64 poles, thence east 12 poles, thence south 62 poles, thence east 148 poles, thence north 62 poles to the beginning, containing 121.35 acres, more or less.

That defendants unlawfully keep plaintiffs out of possession of said land and deny the title of said plaintiff therein. The plaintiff *saith* that the rents and profits of said land held for the last three years by defendants prior to the commencement of this action *is* of the value of $1,000.00.

Wherefore plaintiff prays for a judgment against the said defendants for the possession of said land and for damages for withholding

of said lands and the rents and profits of the same for the sum of one thousand dollars, with costs of suit and a writ of possession.

JAMES M. MASON,
Attorney for Plaintiffs.

Issue summons in above-entitled cause returnable according to law.

J. M. MASON,
Att'y-at-law.

Leave given plaintiff- to amend above petition this 30 June, 1894.

JUNIUS W. JENKINS,
Attorney for Such Defendants as Represented by Me.

STATE OF KANSAS, } ss:
County of Wyandotte, }

In the Court of Common Pleas of Wyandotte County, Kansas.

We do solemnly swear that the cause of action set forth in the petition hereto prefixed is just; and we do further swear that
4 by reason of our poverty we are unable to give security for costs. Affiants are well acquainted with the condition of their coplaintiffs and make this affidavit in behalf of their coplaintiffs, as well as for themselves, and the above statement is true as to all and each of the said plaintiffs in this suit.

his
BRACKET x NAIL WHITETREE.
mark.
ALEX NICHOLS.

Attest: ALEX NICHOLS.

Subscribed and sworn to before me this 11th day of February, 1892.

T. P. ANDERSON,
Judge of Court of Common Pleas, Wyandotte Co., Ks.

STATE OF KANSAS, } ss:
County of Wyandotte, }

Received this summons this 18th day of June, 1892, at 3 o'clock p. m., and served the same in my county on the 21st day of June, 1892, by leaving a true copy of the same, with all the endorsements thereon, at the usual place of residence of each of the following-named defendants, to wit, Hiland H. Reynolds, Albert Willets, Herman Erdmen, and, after diligent search, I was unable to find the following within-named defendants within my county: John S. Stockton, Frank E. Powell, Frank Coatsworth, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, and The Gossard Investment Campany, on the 21st day of June, 1892.

S. S. PETERSON, *Sheriff,*
By J. S. CUMMINS, *Deputy.*

And afterwards, on July 18, 1892, defendants Albert Willetts and Herman Erdman files their answer in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, State of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiff, }
vs. } No. 993.
JOHN S. STOCKTON ET AL. }

Answer of Albert Willets and Herman Erdman.

The defendants Albert Willets and Herman Erdman, for their answers to the plaintiffs' petition herein, say:

1. They deny each and every statement, allegation, and averment therein contained.

2. That the plaintiff-' said cause of action, if any they have, did not accrue within three years next before the commencement of this action.

3. That the plaintiff-' said cause of action, if any they have, did not accrue within fifteen years next before the commencement of this action.

JUNIUS W. JENKINS,
Attorney for Defendants Albert Willets and Herman Erdman.

And on the 18th day of July, 1892, the defendant Hiland H. Reynolds filed his answer in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, State of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiffs, }
vs. } No. 993.
JOHN S. STOCKTON ET AL., Defendants. }

5

Answer of Hiland H. Reynolds.

The defendant Hiland H. Reynolds, for his answer to the plaintiffs' petition herein, says:

1. He denies each and every statement, allegation, and averment therein contained.

2. That the plaintiffs' said cause of action, if any they have, did not accrue within three years next before the commencement of this action.

3. That the plaintiffs' said cause of action, if any they have, dod not accrue within fifteen years next before the commencement of this action.

JUNIUS W. JENKINS,
Attorney for Defendant Hiland H. Reynolds.

And thereafter, on the 26th day of September, 1892, plaintiff- filed their reply to the several answers of defendants, in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMPSCHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 993.

In Reply to the Several Answers of Defendants.

Now comes the plaintiff- and in reply to the 2nd and 3rd counts of defendants' answers contained, setting up the three and fifteen years' statutes of limitation, respectively say—

That the ancestors of the plaintiffs from whom plaintiffs derived title be descent was an incompetent Indian and classed as such under the treaty between the United States and the Wyandotte tribe of Indians concluded the 31st day of January, 1855, and, as such incompetent, was prohibited from alienation- any interest in the lands in controversy, except only the power to lease the sale for the term of two years.

That the defendants and those under whom they claim were bound by the same prohibition, and by the paramount law of the land could acquire no further interest in said land that said ancestor could convey, namely, said leasehold interest.

That said defendants entered into occupation of said lands in subordination to the rights of said ancestor, and whatever holding defendants have had since said entry has been of the same quality and kind of possession as that under which said entry was made, and no notice has ever been brought home to plaintiffs that said holding was adverse until defendants answered in this action.

Plaintiff- therefore deny each and every allegation in defendants' 2nd and 3rd counts of defense contained.

J. M. MASON,
Attorney for Plaintiffs.

Consent is hereby given to file this reply at this time, subject to all objections except to time of filing.

Sept. 23rd, 1892.

JUNIUS W. JENKINS,
Attorney for Several of Def'ts.

And thereafter, on the 11th day of May, 1894, the cause came on for its first trial, and the court thereupon entered judgment for the defendant-, and thereupon plaintiff- demanded another trial, and thereupon the judgment was set aside and a new trial granted, the journal entry of which was in words and figures as follows, to wit:

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL. } No. 993.

MAY 11, 1894.

Now, on this day, comes on to be heard the above-entitled cause, and both parties appearing by counsel, a jury being waived and a trial had by the court; and thereupon it is adjudged by the court upon such hearing that the defendants do have and recover of and from the plaintiffs the said land, with costs of suit.

And thereupon plaintiffs give notice on the journal of the court that they demand another trial, and move the court to set aside and vacate said judgment in the above-entitled cause, this 11th day of May, 1894.

6 And now, on the same day, came James M. Mason, attorney for plaintiff, and by notice and demand, spread at large upon the journal, the plaintiff demanded another trial, and thereupon the said judgment above set forth in above journal entry is by the court vacated and set aside and a new trial granted, pursuant to the provisions of section 599 *on* the Code of Civil Procedure.

And thereafter, on the — day of February, 1895, the following order and journal entry was made by the court, to wit:

JOHN SCHRIMPSCHER
vs.
JOHN S. STOCKTON ET AL. } No. 993.

It is agreed that a jury shall be waived and a trial had by the court, provided the court makes special findings and conclusions and, in addition thereto, accord to the parties the same rights to submit special questions to him for his special answers as they would have in case said cause were tried by a jury to submit said special questions to the jury for their special answer.

J. M. MASON AND
F. E. & J. A. SMITH,
For Plaintiffs.
J. W. JENKINS,
Attorney for Defendants.
T. P. ANDERSON,
Judge of Court of Common Pleas.

And thereafter, on the 16th day of February, 1895, the cause coming regularly on for trial and a jury being waived, the trial was had before the court, and the following findings of fact and answers to questions were made by the court, and the following judgment for the defendants entered, the journal entry of which is in words and figures as follows, to wit:

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants. } No. 993.

FEBRUARY 16, 1895.

And now, on this day, the cause came regularly on for trial and the said plaintiffs appeared in person and by James M. Mason and F. E. and J. A. Smith, their attorneys, and the defendants appeared in person and by Junius W. Jenkins, their attorney, and the said parties plaintiff and defendants, in open court and with the consent of the court, waived a jury herein and submit this cause to the court; and the court, after hearing the evidence and the arguments of counsel for the plaintiffs and defendants and being well and fully advised in the premises, finds that the evidence herein proves the following facts, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMP-CHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 993.

Findings of Fact Made by the Court and Answers Made by the Court at the Request of the Plaintiffs to Questions Submitted by Them.

1. Margaret C. Cherloe was a Wyandott Indian of the competent class, and as such she was given, under the treaty of 1855 with that tribe, allotment No. 42, to lands described as follows, to wit: Commencing at the southeast corner of the northwest quarter (¼) of section 27, in township 10 south, of range 25 east, thence west 160 poles, thence north 64 poles, thence east 160 poles, thence south 64 poles to the beginning, containing 64 acres of land, all in Wyandotte county, Kansas; and afterwards, on the 1st day of June, 1859, there was duly issued to her by the Government of the United States a patent conveying said land to her and to her heirs and assigns forever as an absolute and unconditional grant in fee-simple and without restriction therein as to conveyance; which patent is in words and figures as follows, to wit:

7 D. DEPARTMENT OF THE INTERIOR, W. H. W.
GENERAL LAND OFFICE, J. B. L.
WASHINGTON, D. C., *Dec.* 15, 1891.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copy of a patent, dated June 1, 1859, in favor of Margaret C. Cherloe, is a true and literal exemplification from the records of this office.

The signatures of the officers who signed the patent, of which the annexed is a literal exemplification, were omitted to be copied into the record thereof, as required by law, but section 2469, ch. XI, title XXXII, of the Revised Statutes of the United States provides that the "Commissioners of the General Land Office shall cause to be prepared and shall certify, under the seal of the office, such copies

of records, books, and papers on file in his office as may be applied for, to be used in evidence in courts of justice;" and sec. 2470, same chapter and title, provides that "literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed to be of the same validity in all proceedings, whether at law or equity, wherein such exemplifications are adduced in evidence as if the names of the officers signed and countersigning the same had been fully inserted in such record."

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] THOMAS H. CARTER,
Commissioner of General Land Office.

8 (4–475.)

Wyandott reserves, competent class, A, No. 42 on plat.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, pursuant to the provisions of the 2d, 3d, and 4th articles of the treaty concluded on the 31st January, 1855, between the commissioners on the part of the United States and the Wyandott tribe of Indians, a return, bearing date 14th April, 1859, from the Commissioner of Indian Affairs, has been made to the General Land Office, embracing a transcript entitled "Wyandott reserves, competent class, Book A," designating the several tracts or parcels of land being laid down on the plat connected with said book, bearing date the 22nd February, 1859, at Wyandotte City, Kansas, and certified by the United States commissioner and the commissioner for the Wyandotts as "the plat of the subdivisions of the lands belonging to the Wyandott tribe of Indians, situated in the forks of the Missouri and Kansas rivers," exhibiting "the allotments assigned to each family and individuals adjudged by" said commissioners "to be actual members of the Wyandott nation at the date of the ratification of the treaty of January 31st, 1855, according to the laws, usages, and customs thereof, and that the lines represented" thereon "have been surveyed and marked on the ground, and the corners of the allotment established in the manner customary in the Government surveys;" and

Whereas the following allotment of land, as described in said transcript, Book A, and laid down on the plat aforesaid as No. 42, has been made to Margaret C. Cherloe (Cayundiswa), the said allotments of land being situated in what is known as the "Wyandott reserve," in Kansas, said reserve being the tract of country "situated in the fork of the Missouri and Kansas rivers, which was purchased" by the "Wyandott nation" from the "Delaware Indians," and which allotment is bounded and described as follows, to wit: Commencing at the southeast corner of the northwest quarter of section twenty-seven, in township ten south, of range twenty-five east, thence west one hundred and sixty-

four poles, thence east one hundred and sixty poles, thence
9 south sixty-four poles to the beginning, containing sixty-four acres:

Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the treaty aforesaid, have given and granted, and by these presents do give and grant, the tract or parcel of land above described unto the said Margaret C. Cherloe, as aforesaid, and to her heirs and assigns forever, as an absolute and unconditional grant in fee-simple:

To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Margaret C. Cherloe and to her heirs and assigns forever.

In testimony whereof I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this first day of June, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-third.

By the President:

JAMES BUCHANAN,
[L. S.] By G. A. B. LEONARD,
Secretary.

J. N. GRANGER,
Recorder of the General Land Office.

[Endorsed:] Mason.

10 II. After the issuance of said patent and prior to the 31st day of August, 1863, said Margaret C. Cherloe died intestate, leaving Carey Rodgers, an only grandson and next of kin, and leaving no husband or children and no father or mother.

III. On August 31st, 1863, the said Carey Rodgers made, executed, and delivered to Jesse Cooper and Mary E. Stockton the following instrument in writing, to wit:

Know all men by these presents, that I, Carey Rodgers, for myself and as grandson and only heirs-at-law of Margaret C. Cherloe, deceased, for and in consideration of one hundred and twenty-eight (128) dollars, received of Jesse Cooper and Mary E. Stockton, do hereby bargain, sell and convey unto the said Jesse Cooper and Mary E. Stockton the following-described land, tenements and hereditaments, situated in Wyandotte county, in the State of Kansas, to wit:

Commencing at the southeast corner of the northwest quarter of section twenty-seven (27) township ten, (10) south of range twenty-five (25) east: thence west 160 poles, thence north 64 poles, thence east 160 poles, thence south 64 poles, to the beginning: containing 64 acres of land.

And the grantor covenants with the grantee that he is lawfully seized in fee-simple of said lands, that he has a good right to convey the same, and that said lands are free from all incumbrances, that

the grantors shall quietly enjoy the same, and that they, and that the grantor will warrant and defend the title of said land to Jesse Cooper and Mary E. Stockton against the claims of all persons whatsoever: and I, Carey Rodgers, further covenant and agree that I will, when I become of lawful age, ratify this, my conveyance, and in case I should fail or refuse to do so, then and in that event I agree to refund to said Jesse Cooper and Mary E. Stockton, the full consideration of this deed, to wit: ($128.00) and twelve per cent. interest per annum, from this date, which said money and interest shall be paid to them before I have any right to receive said deed.

In witness whereof, I have hereunto set my hand and seal, this 31st day of August, A. D. 1863.

his
CAREY x ROGERS.
mark.

Signed, sealed, and delivered in presence of—
JOHN W. GREYEYES.
MAURICE SHERMAN.

STATE OF KANSAS, }
Wyandotte County, } ss:

Be it remembered that on this 31st day of August, A. D. 1863, before me, J. Stilwell Stockton, a notary public in and for said county, personally appeared Carey Rodgers, personally known to me to be the identical person who signed the foregoing deed as grantor, and the contents was made known to him and freely interpreted to him by John W. Greyeyes, after which he acknowledged that he executed said deed freely and voluntarily, for the uses and purposes therein expressed.

In witness whereof I have hereunto set my hand and seal of office the day and year last aforesaid.

[SEAL.] J. STILWELL STOCKTON,
Notary Public.

Which instrument was acknowledged before J. S. Stockton, the husband of one of the grantees therein and the law partner of the other of said grantees.

IV. Carey Rodgers was a Wyandotte Indian, belonging to the incompetent class by reason of being an orphan, and under said Wyandotte treaty of 1855 there was given to him allotment No. 278, alloting to him the following lands in Wyandotte county, to wit:

Commencing at the northeast corner of southwest quarter of section 27, township 10 south of range 25 east, thence south 62 poles, thence west 148 poles, thence north 62 poles, thence east 148 poles to the place of beginning, containing 57.35 acres.

On the first day of September, 1859, a patent for said lands was issued by the Government of the United States to him and to his heirs and assigns forever; which patent is in words and figures following, to wit:

11 (4–207.)

D. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Dec.* 15, 1891.

I, Thomas H. Carter, Commissioner of the General Land Office, do hereby certify that the annexed copy of a patent, dated September 1, 1859, in favor of Carey Rogers, is a true and literal exemplification from the records of this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] THOMAS H. CARTER,
Commissioner of General Land Office.

Wyandott reserves, incompetent class, B No. 278 on plat.

To all to whom these presents shall come, Greeting:

Whereas, pursuant to the provisions of the 2d, 3d, and 4th articles of the treaty concluded on the 31st January, 1855, between the commissioners on the part of the United States and the Wyandott tribe of Indians, a return, bearing date 14th April, 1859, from the Commissioner of Indian Affairs has been made to the General Land Office, embracing a transcript entitled "Wyandott reserves, incompetent class, Book "B," designating the several tracts or parcels of land awarded to the heads of families and to individuals of the said tribe, the said tracts or parcels of land being laid down on the plat connected with said book, bearing date the 22nd February, 1859, at Wyandotte City, Kansas, and certified by the United States commissioner and the commissioners for the Wyandotts as the "plat of the subdivisions of the lands belonging to the Wyandott tribe of Indians, situated in the forks of the Missouri and Kansas rivers," exhibiting "the allotments assigned to each family and individual adjudged by" said commissioners "to be actual members of the Wyandott nation at the date of the ratification of the treaty of January 31st, 1855, according to the laws, usages, and customs thereof, and that the lines represented" thereon "have been surveyed and marked on the ground and the corners of the allotments established in the manner customary in the Government surveys;" and

Whereas the following allotment of land, as described in said transcript, Book B, and laid down on the plat aforesaid as No. 278, has been made to Carey Rodgers (male), the said allotment of land situated in what is known as the "Wyandott reserves," in Kansas, said reserve being the tract of country "situated in the fork of the Missouri and Kansas rivers, which was purchased" by the "Wyandott nation" from the "Delaware Indians," and which allotment is bounded and described as follows, to wit:

Commencing at the northeast corner of the southwest quarter of section twenty-seven, in township ten south of range twenty-five east,

thence south sixty-two poles, thence west one hundred and forty-eight poles, thence north sixty-two poles, thence east one hundred and forty-eight poles to the beginning, containing fifty-seven
12 acres and thirty-five hundredths of an acre.

Now know ye that the United States of America, in consideration of the premises and pursuant to the provisions of the treaty aforesaid, have given and granted and by these presents do give and grant the tract or parcel of land above described unto the said Carey Rodgers and to his heirs and assigns forever, with the condition "that the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being, and with the further and express condition, as specified in the fourth article of the treaty with the Wyandotts of the 31st January, 1855, that the lands are not to be sold or alienated for a period of five years:

To have and to hold the said tract or parcel of land, with the appurtenances, unto the said Carey Rodgers and to his heirs and assigns forever, with the conditions aforesaid.

In testimony whereof I, James Buchanan, President of the United States, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, this first
[L. S.] day of September, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Independence of the United States the eighty-fourth.

By the President:

JAMES BUCHANAN,
By G. A. B. LEONARD, *Secretary.*

J. N. GRANGER,
Recorder of the General Land Office.

13 V. On the 15th day of November, 1864, the said Carey Rodgers made, executed, and delivered an instrument of writing to Jesse Cooper and Mary E. Stockton; which instrument of writing is in words and figures as follows, to wit:

Know all men by these presents that I, Carey Roders (male), for and in consideration of ($228), do hereby grant, bargain, and sell unto Jesse Cooper and Mary E. Stockton the following real estate situated in Wyandotte county and described as follows:

Commencing at the northeast corner of the southwest quarter of section twenty-seven (27), township 10 S., R. 25, thence south 62 poles; thence west 148 poles; thence north 62 poles; thence east 148 poles to the beginning, containing 57.35 acres of land, and the grantor covenants with the grantees that he is seized in fee-simple of said land; that he has good right to sell the same; that they are free from all incumbrance, and that he will warrant and defend the title in said land unto the said Jesse Cooper and Mary E. Stockton against the claims of all persons.

Witness my hand and revenue stamps this 15th day of November, 1864.

his
CAREY x ROGERS (*Male*).
mark.

In presence of—
WILLIAM JOHNSON.
J. S. STOCKTON.

STATE OF KANSAS, }
Wyandotte County, } ss:

Be it remembered on this 15th day of November, 1864, before me, J. Stilwell Stockton, a notary public in and for the said county of Wyandotte, personally appeared Carey Rogers (male), personally known to me to be the identical person who signed and executed the above deed as grantor, and after the contents of said deed *was* by me fully explained and made known to him he acknowledged that he signed and executed said deed freely and voluntarily for the uses and purposes therein mentioned.

Witness my hand and official seal the date last aforesaid.

[SEAL.] J. STILWELL STOCKTON,
Notary Public.

Recorded November 16th, A. D. 1894, at 10 a. m.

JAMES A. CRUISE,
Register of Deeds.

The acknowledgement of said instrument was taken before J. S. Stockton, as notary public, who was at the time the husband of one of the grantees and the law partner of the other.

VI. On the 25th day of February, 1869, by a partition deed of that date by Jesse Cooper and his wife and Mary E. Stockton and her husband, there was conveyed to said Mary E. Stockton the land sued for in this action and described in the petition.

VII. Said Carey Rogers died intestate between the first and ninth days of December, 1867.

VIII. On April the 4th, 1877, Lucy A. Cherloe made, executed, and delivered to Byron Judd and instrument of writing, of which the following, with all of the endorsements thereon, is a true copy:

This indenture made this 14th day of April, in the year of our Lord one thousand eight hundred and seventy-seven, between Lucy A. Cherloe, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, Theresa Whitecrow and Isaac Peacock, heirs of Carey Rogers, deceased, an orphan Wyandotte Indian, under the treaty of 1855, of the first part and Byron Judd, of the county of Wyandotte and State of Kansas, of the second part,

Witnesseth, that the said party of the first part, in consideration of the sum of one hundred and seventy-five dollars to them duly paid, have sold, and by these presents do grant, bargain, sell, and convey to the said party of the second part, his heirs and assigns, all

of the following-described lands and tenements situated in the county of Wyandotte & State of Kansas, and described as follows, to wit:

Commencing at the northeast corner of the southwest quarter of section twenty-seven (27) in township ten (10) south of range twenty-five (25) east, thence south sixty-two (62) poles, thence west one hundred and forty-eight (148) poles, thence north sixty-two (62) poles, thence east one hundred and forty-eight (148) poles to the beginning, containing fifty-seven and thirty-five one-hundre-ths (57.35) acres with the appurtenances and all estate title and interest of the said first part- therein; and the said party of the first part do
14 hereby covenant and agree that at the delivery hereof they are the lawful owners of the premises above granted, and seized of a good and indefeasible estate of inheritence therein, free and clear of all incumbrances, and that they will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part have hereunto set their hands the day and year above written.

LUCY A. CHERLOW.
her
JANE SARAHESS. x
mark.
her
MARGARET PIPE. x
mark.
her
ELIZA SPLITLOG. x
mark.
JOHN R. BARNETT.
her
THERESA WHITECROW x
mark.
her
ISAAC PEACOCK. x
mark.

Executed and delivered in presence of—
ENDSLEY JONES,
N. J. VAN ARNAM.

QUAPAW INDIAN AGENCY, }
Indian Territory, } *ss*:

On this fourteenth day of April, 1877, before me, a U. S. Indian agent in and for the Quapaw Indian agency, Indian Territory, came Lucy A. Cherlow, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, and Theresia Whitecrow and Isaac Peacock, to me personally known to be the same persons who executed the foregoing instrument, and duly acknowledged the execution of the same.

And I further certify that I made known to the grantors the contents of the said deed, and explained to them the purport and meaning thereof, and that they freely acknowledged the signing,

sealing, and execution thereof, and *was* satisfied and contented with the consideration paid ther-for, and that they executed the said deed and made the acknowledgement of the same without any circumvention or undue persuasion of the grantee or any other person or persons whomsoever.

Witness my hand the day and year aforesaid as such Indian agent.

H. W. JONES,
U. S. Ind'n Agent.

DEPART. OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS, *June* 23*rd*, 1877.

The within deed to Byron Judd from Lucy A. Cherlow, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, Theresa Whitecrow, and Isaac Peacock, heirs of Carey Rogers, a deceased Wyandotte Indian, is respectfully submitted to the honorable Secretary of the Interior for his approval.

I. L. SMITH,
Commissioner.

DEPART. OF THE INTERIOR, *June* 25*th*, 1877.

The within deed is hereby approved.

A. BELL,
Acting Secretary.

QUAPAW AGENCY,
Indian Territory, } ss:

I, W. H. Jones, U. S. Ind'*d* agent in and for the above agency, do hereby certify that the sum named in the accompanying deed of Lucy A. Cherlow, Jane Sarahess, Margaret Pipe, Eliza Splitlog, John R. Barnett, and Theresa Whitecrow and Isaac Peacock, heirs of Carey Rogers, deceased, an orphan Wyandotte Indian, under the treaty of 1855, to Byron Judd, was paid to grantors in lawful money of the United States, and that said grantors are the sole and only heirs of Carey Rogers.

That said grantors are capable of taking care of and properly
15 managing their property, and that the consideration, one hundred and seventy-five ($175.00) dollars, is a full and fair price for the land intended to be conveyed.

Witness my hand this 28th day of May, 1877.

W. H. JONES,
U. S. Ind'n Agent.

Entered on transfer record August 22nd, 1877.
D. R. EMMONS, *Co. Clerk.*

Recorded August 22nd, 1877, at 5¾ o'clock p. m.
JAMES S. CLARK,
Register of Deeds.

IX. On the 27th day of September, 1877, Byron Judd and wife made, executed, and delivered to Mary E. Stockton their certain deed,

in writing, by which deed they conveyed all of their right, title, and interest in and to the following-described lands:

Commencing at the northeast corner of the southwest quarter of section 27, in township 10 south of range 25 east, thence south 62 poles, thence west 86 poles, thence north 62 poles, thence east 86 poles to beginning, containing 33.25 acres, being that portion of the land described in said allotment No. 278, sued for in this action; which deed contains the usual covenants of general warranty.

X. That on the 30th day of January, 1885, Mary E. Stockton, by a warranty deed of that date, describing the lands sued for herein, conveyed to John S. Stockton, one of the defendants, all of the interest which she had in said lands.

XI. On the 10th day of February, 1888, John S. Stockton and wife conveyed, by warranty deed of that date, all their interest in that portion of the land in suit to Jay Coatsworth and Hiland H. Reynolds, defendants, described as follows, to wit:

Commencing at a point 25 and $\frac{80}{100}$ poles west of the center of section twenty-seven (27), township ten (10), range twenty-five (25) east, in Wyandotte county, Kansas, thence west 60 and $\frac{20}{100}$ poles, thence south 62 poles, thence east 60 and $\frac{20}{100}$ poles, thence north 62 poles to the beginning containing 23 and $\frac{25}{100}$ acres.

And no conveyance has been made by said Coatsworth and Reynolds since said last-mentioned date.

XII. On the 28th day of January, 1888, said John S. Stockton and wife, by warranty deed of that date, conveyed all their title and interest to Frank E. Powell, defendant, to that portion of the land sued for described as follows, to wit:

Commencing at the center of section 27, township 10 south, range 25 east, thence south 62 poles, thence west 25 and $\frac{80}{100}$ poles, thence north 62 poles, thence east 25 and $\frac{80}{100}$ poles to the beginning, containing ten (10) acres of land in Wyandotte county, Kansas, and no conveyance of said described land has been made by said Powell since said last date.

XIII. Immediately after the execution of said deed from said Carey Rogers to Jesse Cooper and Mary E. Stockton, of date August 31st, 1863, and November 15, 1864, said grantees took possesion of all the land described in said deeds under claim of title and ownership by virtue of said deeds, and made permanent improvements thereon, and they and their grantees have had and held open, peaceable, quiet, undisturbed, actual, notorious, exclusive, and adverse possession of all the said lands, except as shown in findings number 15, claiming title thereto ever since the dates of said deeds, and have paid all taxes, cleared said lands of timber, and cultivated the same be tenants.

XIV. The defendants and their grantors acted in good faith in making the purchase of said lands and in taking the deeds thereto of date Aug. 31st, 1863, and Nov. 15, 1864, April 14th, 1877.

16 XV. On the first of March, 1891, there was no building or residence upon the property in controversy, the residence which had been upon the same having been destroyed by fire. The land in controversy was not cultivated that year by the defendants,

except a portion—some 15 or 20 acres—in the northwest corner thereof, which was leased in writing from the defendants, upon the north half of the land in controversy, one James M. Mason, claiming to represent the plaintiff- as their agent and attorney, made a lease in writing, on the first day of March, 1891, to Jay Ikler and Adam Berlin to the land in controversy in this action, and by virtue thereof said Ikler and Berlin executed leases to certain other persons to certain portions of said tract, and said Jay Ikler and Adam Berlin and their subtenants, during the spring of 1891, plowed and planted about 35 acres of said land; that after the same was planted there was a rise in the river and a portion of this land was overflowed, so that very little crops *was* raised during the year. Subsequent to the overflow and late in the summer Adam Berlin sowed millet, and raised a crop thereof, upon about ten acres; also one Davis sowed some millet, but there was, for some reason, no result therefrom, and it is disputed whether Davis cultivated what he did under the plaintiffs or defendants; he probably, at different times, verbally recognized both parties as his landlord, but no person received rent from him.

All that Davis cultivated, as well as a portion of that cultivated by the other persons who occupied under the lease made by Mr. Mason, was on that portion of the land that was leased by defendants to A. M. Willetts. Neither Mason or any tenant claiming through him under the plaintiffs occupied or cultivated any portion of the said land at any time, except as above stated.

In 1892 one person, claiming under the plaintiffs, attempted to plow thereon, but was prevented by the defendants.

XVI. All of the deeds mentioned in these findings were duly recorded in the office of the register of deeds of Wyandotte county, Kansas, promptly after their execution.

In accordance with the stipulation herein filed, the plaintiffs herein, by their attorneys, J. M. Mason and F. E. & J. A. Smith, submit to the court for answer the following special questions:

Question 1. Was Carey Rogers an incompetant Wyandotte Indian, under the Wyandotte treaty of 1855?

Answer. Yes.

Question 2. If the above question is answered in the affirmative, state whether Carey Rogers belonged to the third classification of Wyandotte treaty of 1855, of idiots, insane, and orphans.

Answer. Yes.

Question 3. Was Carey Rogers the next of kin of Margaret Cherloe?

Answer. Yes.

Question 4. Was Margaret C. Cherloe the allotte- and patentee of the following-described land, to wit: Commencing at the S. E. corner of the N. W. ¼ of section 27, town 10 south of range 25, in Wyandotte county, Kansas, thence west 86 poles, thence north 64 poles, thence east 86 poles, thence south 64 poles to the beginning, being the east 86 poles of allotment No. 42, competent class, under the Wyandotte Indian treaty of 1855, and called in this suit Stockton tract?

Answer. Yes.

Question 5. Was Carey Rogers the grandson of Margaret Cherloe?

Answer. Yes.

Question 6. Was Margaret Cherloe a Wyandotte Indian?

Answer. Yes.

Question 7. If the question is answered in the affirmative, state whether she belonged to that classification of Wyandotte treaty of 1855 known as competants.

Answer. Yes.

17 Question 8. Was Carey Rogers the allottee and patentee of the following-described lands from the United States, to wit: Commencing at the N. E. corner of the S. W. ¼ of section 27, town 10 south of range 25, in Wyandotte county, Kansas, thence south 62 poles, thence west 86 poles, thence north 62 poles, thence east 86 poles to the beginning, and containing — acres, more or less, being the east 86 poles of allotment number 278, incompetent class, under the Wyandotte treaty of 1855?

Answer. Yes.

Question 9. What was the date of the patent for allotment 278?

(Question withdrawn.)

Question 10. What was the date of the patent of allotment 42?

(Question withdrawn.)

Question 11. Was the instrument purporting to be a conveyance dated August 31st, 1863, recorded in Book F, page 413, Sept. 2, 1863, by and from Carey Rogers to Jesse Cooper and Mary E. Stockton, for allotment 42, ever approved by the Secretary of the Interior, or other officer authorized to approve the same?

Answer. No.

Question 12. Was the instrument purporting to be a conveyance dated November 15, 1864, and recorded November 16, 1864, in Book H, page 250, from Carey Rogers to Jesse Cooper and Mary E. Stockton, for allotment 278, ever approved by the President of the United States, or other officer authorized to approve the same?

Answer. No.

Question 13. Was J. Stillwell Stockton, on August 31st, 1863, and November 15, 1864, the husband of Mary E. Stockton?

Answer. Yes.

Question 14. Was J. Stillwell Stockton, on August 31st, 1863, and November 15, 1864, the business partner of Jesse Cooper?

Answer. He was the law partner.

Question 15. Before whom were the deeds mentioned in questions 11 and 12 acknowledged?

Answer. J. Stillwell Stockton.

Question 16. Did Jesse Cooper and Mary E. Stockton enter upon the land in controversy under the deeds mentioned in questions 11 and 12?

Answer. Yes.

Question 17. If question 16 is answered in the affirmative, state

when said Jesse Cooper and Mary E. Stockton entered into the possession thereof.

Answer. Shortly after the date of the deed.

Question 18. Has J. S. Stockton, defendant herein, been out of the State of Kansas at any time since the title to the land in controversy has been claimed by him? If so, state how long, and where.

Answer. Yes; he resided out of the State from March, 1888, to August, 1894, but has been in the State during said times frequently, and at other times he has been out of the State occasionally when he resided therein.

Question 19. How old was Carey Rogers in August, 1863?

(Question withdrawn.)

Question 20. How old was Carey Rogers in November, 1864?

Answer. Eighteen.

Question 21. How old was Carey Rogers when he died?

Answer. Twenty-one.

Question 22. When did Carey Rogers die?

Answer. About the first of December, 1867.

18 Question 23. Was the land in controverst not tilled or tilled in 1881?

Answer. Very little, if any, was tilled that year.

Question 24. Was the land in controversy not tilled or tilled during the years 1885 and 1886 or either of them?

Answer. Some of the land was cultivated in 1885, but very little, if any, was cultivated in 1886.

Questions 26 and 27 withdrawn.

Question 28. Did Stockton and Cooper enter into the possession of the land in controversy under the written intrument from Carey Rogers and dated August 31st, 1863, and November 15, 1864?

Answer. Yes.

Question 29. Did ever Stockton or Cooper or their grantees offer to deliver up the possession of the land in controversy to the heirs of Carey Rogers?

Answer. No.

Question 30. Did Carey Rogers sign said written instrument by writing his name or making his mark?

Answer. Yes; by making his mark.

Question 31. At the time of the commencement of this suit, did the defendants in this cause still hold possession of the land in controversy under the written instrument from Carey Rogers to Cooper and Stockton?

Answer. Yes; together with the subsequent deed made to Byron Judd mentioned in the finding of fact number 8.

Question 32. Who are the sole surviving next of kin, following the male line, of Carey Rogers, deceased?

Answer. Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams.

Question 33. Were the grantors in the deed to Byron Judd dated

April 14th, 1877, the next of kin of Carey Rogers following the male line?

Answer. No.

Question 34. Did Carey Rogers leave either wife or children?

Answer. No.

Question 35. Has Mr. Coatsworth been a resident of this State since he claimed an interest in this land?

Answer. The proof does not show where the Coatsworth who is a defendant in this action lives or has lived.

Question 36. Has Mr. Powell been a resident of this State since he has claimed an interest in this land?

Answer. The evidence does not show.

And thereupon the court makes the following conclusions of law, to wit:

Conclusions of Law.

1st. The plaintiffs are not entitled to any relief in this action.

2nd. That the defendants are entitled to a judgment for their costs herein expended.

T. P. ANDERSON,
Judge of the Court of Common Pleas.

It is therefore ordered, adjudged, and decreed by the court that the plaintiffs take nothing by their suit and that the defendants recover of the plaintiffs the costs in this behalf expended, now taxed at $91.55, for which let execution issue.

19 And thereafter, on the 18th day of February, 1895, plaintiffs filed their motion for a judgment in their favor upon the special findings of fact made by the court; which motion was in words and figures as follows, to wit:

In the Court of Common Pleas of Wyandotte County, Kansas.

JOHN SCHRIMPSCHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 993.

Now comes the plaintiff- and moves the court for a judgment in their favor on the special findings of fact by the court, notwithstanding the adverse conclusions of law.

JAMES M. MASON,
Att'y for Plaintiffs.

And thereafter, on the 18th day of February, 1895, plaintiff- filed their motion for a new trial in words and figures as follows, to wit:

STATE OF KANSAS, } ss:
County of Wyandotte, }

In the Common Pleas Court for the County of Wyandotte, in the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs, } No. 993.
against
JOHN S. STOCKTON ET AL., Defendants. }

Now come the plaintiffs and move the court for a new trial in the above-entitled cause for the following reasons, to wit:

Irregularity in the proceedings of the court and prevailing party—abuse of discretion by which the plaintiff- *was* prevented from having a fair trial.

Misconduct of the prevailing party.

Accident and surprise, which ordinary prudence could not have guarded against.

Findings appearing to have been given under the influence of passion and prejudice.

The verdict-report decision is not sustained by sufficient evidence and is contrary to law.

Newly discovered evidence material to said plaintiffs which could not, with reasonable diligence, have been discovered and produced at the trial.

Error of law occurring at the trial and excepted to at the time by said plaintiffs.

NOTE.—Affidavits and other evidence will be used on the hearing of said motion.

JAMES M. MASON,
Attorney for said Plaintiffs.

And afterwards said motions for a judgment and motion for a new trial were severally heard by the court and were severally overruled by the court and said rulings excepted to by the plaintiffs, of which the following are the journal entries, to wit:

Journal 9, page 34.

JOHN SCHRIMPSCHER ET AL., Plaintiffs, } No. 993.
vs.
JOHN S. STOCKTON ET AL., Defendants. }

SATURDAY, *March 2nd*, 1895.

Now, on this day, this cause comes on for hearing on the motion of plaintiff- for judgment in favor of plaintiff- on the findings—plaintiffs appeared by their attorney, James M. Mason, and defendants appeared by their attorney, Junius W. Jenkins—and the court, after hearing the argument of counsel, doth overrule said motion; to which ruling of the court the plaintiff- at the time duly excepted.

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants.

Now, on this day, this cause comes on for hearing on the motion of plaintiff- for a new trial, plaintiff- appearing by their attorneys, James M. Mason, and defendants appearing by their attorney, Junius W. Jenkins, and the court, after hearing the arguments of counsel and being well and fully advised in the premises, doth overrule said motion; to which ruling of the court plaintiff- excepted, and *is* given 90 days to make and serve a case for the supreme court; defendants given 20 days thereafter to suggest amendments; case to be settled and signed on 5 days' notice.

I, George H. Jenkins, clerk of the court of common pleas of Wyandotte county, Kansas, do hereby certify that the within and foregoing is a true and correct transcript of the proceedings had in the above-entitled cause.

[SEAL OF COURT.] GEO. H. JENKINS, *Clerk.*

Filed May 18, 1895.
C. J. BROWN,
Clerk of Sup. Court.

21 And also, on the same day, there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which, with the endorsements thereon and the approval thereof, is in words and figures as follows, to wit:

In the Supreme Court of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiff- in Error,
vs.
JOHN S. STOCKTON ET AL., Defendant- in Error. } Security for Costs.

We, and each of us, enter as security for all costs which may accrue to said defendant- in error, or to the officers of this court herein; and in default of payment by said plaintiff- in error of said costs and after ten days' notice we agree that execution may issue against our property for unpaid costs.

JOHN S. RAY.

[Endorsed:] 10320. No. —. John Schrimpcher *et al. vs.* John S. Stockton *et al.* Bond for costs. Approved and filed May 18, 1895. C. J. Brown, clerk sup. court. This bond is perfectly good. F. E. & J. A. Smith, attorney- for plaintiff- in error.

22 And be it further remembered that on the 18th day of May, 1895, there was issued from the supreme court of the State of Kansas a summons in error, which, with the return of service endorsed thereon and all other endorsements, is in words & figures as follows, to wit:

23 STATE OF KANSAS, *ss:*

Supreme Court.

The State of Kansas to the sheriff of Wyandotte county, Greeting:

You are hereby commanded to notify John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, defendants in error, that John Schrimpcher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherlee, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors, and Malinda W. Splitlog, Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, plaintiffs in error, did, on the 18th day of May, A. D. 1895, file in the clerk's office of the supreme court of Kansas a petition in error and transcript of record or case-made, the object of which is to obtain a reversal of a certain judgment rendered by the court of common pleas sitting within and for the county of Wyandotte and State of Kansas, in an action pending before said court wherein the said plaintiffs in error were plaintiffs and the said defendants in error were defendants.

You will make due return of this summons in error on or before the 28th day of May, A. D. 1895.

Witness my hand and the seal of the supreme court affixed hereto, at my office in Topeka, this 18th day of May, A. D 1895.

C. J. BROWN,
Clerk Supreme Court,
By V. T. GRAVES, *Dep'y.*

[SEAL.]

(Endorsed:) 10320. John Schrimpscher *et al. vs.* John S. Stockton *et al.* Summons in error. Issued May 18, 1895; returnable May 28, 1895. Filed May 27, 1895. C. J. Brown, clerk sup. court. (Copy.)

STATE OF KANSAS, }
Wyandotte County, } *ss.*

Received this writ May 18th, 1895, and served the same in said county by delivering to J. W. Jenkins and O. L. Miller, attorneys of record for the within-named defendants in error, each personally,

a true copy of said summons, with all the endorsements thereon, May 20th, 1895.

S. S. PETERSON, *Sheriff*,
By C. PATTERSON, *Deputy*.

Copies	$.50
Service	.75
Total	1.25

24 And afterwards, on the 28th day of October, 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a stipulation and agreement as to the filing of briefs, which is in the words and figures *and figures* as follows, to wit:

25 In the Supreme Court of Kansas.

JOHN SCHRIMPSCHER ET AL.
vs.
JOHN S. STOCKTON ET AL. } No. 10320.

Stipulation.

It is agreed that the brief of John S. Stockton, one of the defendants in error, may be served on Oct. 27, 1897, or before that date, and any reply may be filed in ten days thereafter the same as if filed in the time provided by the rules of court.

C. S. McLANE,
Representing Stockton's Interest.
JAMES M. MASON,
Att'y for Pl'ff- in Error.

26 And also be it remembered that on the 4th day of November, A. D. 1897, the same being one of the judicial days of the regular July, A. D. 1897, term of the said supreme court of the State of Kansas, said court being in session, at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the office of the clerk of said court, to wit:

27 *Journal Entry of Submission.*

JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
JOHN STOCKTON ET AL., Def'ts in Error. } No. 10320.

This cause comes on to be heard on the petition in error and transcript of the record of the court of common pleas of Wyandotte county, and thereupon, after oral argument by J. A. Smith, for the plaintiffs in error, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

28 And afterwards, on the 6th day of November, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas an affidavit of one J. A. Smith showing the value of the property in controversy, which, with the endorsements thereon, is in the words & figures as follows, to wit:

29 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
J. S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

J. A. Smith, of lawful age and first duly sworn, upon his oath says that the property in controversy is of the value of more — $5,000.00 *thousand dollars*, exclusive of costs.

J. A. SMITH.

Subscribed and sworn to before me this 5th day of November, 1897.

J. M. HEWLETT,
Clerk of Court of Common Pleas,
[SEAL.] By F. L. KENNY, *Dep-ty.*

(Endorsed:) #10320. Affidavit of J. A. Smith as to value in controversy. Filed Nov. 7, 1897. Jno. Martin, clerk sup. court.

30 And afterwards, on the 9th day of December, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion for further time for the filing of briefs; which motion, with the endorsements thereon, is in the words and figures as follows, to wit:

31 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON, FRANK POWELL, H. H. REYNOLDS, H. N. Page, William Westurland, J. O. *O*Clark, American Cotton Milling Co., Albert Willets, Hermann Erdmann, and Gossard Investment Co., Defendants in Error. } No. 10320.

Motion.

Come now the above-named defendants, H. H. Reynolds, Frank Coatsworth, and Hermann Erdmann, and comes also Fannie L. Coatsworth, and move the court to grant them time to file briefs in answer to the brief of the plaintiff- in error, and as grounds for said motion state the following:

That they are respectively owners of or are otherwise directly interested in the title to the land in controversy in this suit, having all derived title thereto through a common grantor, viz., John S. Stockton, the defendant above named, whose warranty of title to

some part or other of the land in dispute herein they respectively hold.

That at the trial of this case in the court below, to wit, in the district court of Wyandotte county, Kansas, these movants were represented by counsel and attorney, to wit, Junius W. Jenkins, an attorney, member of the bar of said county, who was employed by their said warrantor, John S. Stockton, and that said Jenkins continued as the attorney of record for a long time after this case was brought to this court, to wit, until the month of October, 1897, when, without the knowledge of these movants or any of them, said Stockton dismissed said attorney, Junius W. Jenkins, and failed to employ any other attorney to represent their interests in this court. and that on that account no brief in their behalf has been filed herein, and no oral argument for them made.

That the brief filed by C. S. McLane, attorney of record for said Stockton in this case, relates not to the interests in said land by them held and owned, but relates exclusively and solely to other lands embraced in the plaintiffs' petition, and by its terms expressly excludes all reference to the title of these movants' lands, notwithstanding the fact that the validity of their said titles is equally involved in this suit, and was by the decree of the lower court upheld.

That the above facts have just come to their knowledge on this 8th day of December, 1897; that they have a good and valid defense to all claims against their title, and that if granted sufficient time therefor they will file briefs in answer to the brief of the plaintiff- herein as the court may allow or direct.

DAN'L B. HENDERSON,
Attorney for Defendants Reynolds, Erdmann, Frank Coatsworth, and for Fannie L. Coatsworth.

(Endorsed:) No. 10320. In the supreme court of the State of Kansas. John Schrimpscher *et al.*, plaintiffs in error, *vs.* John S. Stockton *et al.*, defendants in error. Motion for time to file briefs. Filed Dec. 9, 1897. Jno. Martin, clerk sup. court.

32 And also, on the 9th day of December, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas the affidavit of one Fannie L. Coatsworth in support of the motion for further time to file briefs, which, with the endorsements thereon, is in the words and figures as follows, to wit:

33 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON, FRANK POWELL, H. H. REYNOLDS, H. N. Page, William Westurland, J. O. Clark, American Cotton Milling Co., Albert Willets, Hermann Erdman, and Gossard Investment Co., Defendants in Error. } No. 10320.

Affidavit in Support of Motion.

Fannie L. Coatsworth, on her oath, being duly sworn, says that she is and for three years last past has been the owner in fee of the following-described real estate in the county of Wyandotte, State of Kansas, to wit: Commencing at a point 25 and 80 one-hundredths poles west of the centre of section 27, township 10, range 25, running thence west 30 and 10 — hundredths poles, thence south 62 poles, thence east 30 and 10 — hundredths poles, thence north 62 poles to the place of beginning, containing 11.62 acres of land, more or less.

That said land is a part of the land the title and ownership of which is in dispute in the above-entitled cause.

That she acquired the title to said land through John S. Stockton, one of the defendants above named, and that the title of all the other defendants to the land in controversy herein, as affiant is informed and verily believes, is likewise derived from and through said John S. Stockton.

That during all the time the above-named suit was pending in the district court of Wyandotte county, Kansas, and for a long time thereafter, and while the same was pending, on appeal, in this court, said John S. Stockton defended not only his own interest therein, but also the interest of this affiant, and, as affiant is informed and verily believes, of all the other defendants above named.

That said Stockton employed Junius W. Jenkins, a lawyer of Kansas City, Kansas, to represent him and the other defendants in the trial of this case in the said district court of Wyandotte county, and that said Junius W. Jenkins was and remained the attorney of record in said cause until some time in the month of October, 1897, when he was dismissed from his employment herein without this affiant's knowledge, and that no one else was then employed by said Stockton or by any one else to appear in this court and represent the interests of this affiant, and that her interest in the said land has not been and is not represented at the present time in this court; but that, on the contrary, the only appearance in this court by any one representing or pretending to represent any of the above-named defendants was made by C. S. McLane, an attorney of Kansas City, who appears herein on behalf of said defendant, Stockton, alone, and whose brief, filed in this court in this case, expressly omits from its scope and discussion the land and title of this affiant.

Affiant states that no brief in this case has ever been served on her or her grantor, and that the facts above recited have only come

to her knowledge this the 8th day of December, 1897, and that she has been unable on that account to take any earlier steps for the
34 protection of her rights in the premises, and that if sufficient time be granted her by this court she will file a brief in answer to the brief filed by the plaintiff herein.

FANNIE L. COATSWORTH.

Subscribed and sworn to before me this 8th day of December, 1897.

[SEAL.] HARRY W. DURALL,
Notary Public.

Com. expires Oct. 27, 1901.

(Endorsed:) No. 10320. In the supreme court of the State of Kansas. John Schrimpscher *et al.*, plaintiff- in error, *vs.* John S. Stockton *et al.*, defendants in error. Affidavit of Fannie L. Coatsworth in support of motion. Filed Dec. 9, 1897. Jno. Martin, clerk sup. court.

35 And also be it remembered that on the 9th day of December, A. D. 1897, the same being one of the judicial days of the regular July, A. D. 1897, term of the said supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the office of the clerk of said court, to wit:

36 *Journal Entry of Submission of Motion.*

JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
JOHN S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

Now comes on to be heard the motion of defendants in error for leave to file their briefs within some time fixed by the court in this case for the reasons set forth in said written motion, on file herein, and thereupon, after oral argument by Daniel B. Henderson for the motion, said motion is submitted and taken under advisement by the court.

37 And afterwards, on the 11th day of December, A. D. 1897 there was filed in the office of the clerk of the supreme court of the State of Kansas the affidavit of one H. H. Reynolds in support of the motion for time to file briefs, which, with the endorsements thereon, is in the words and figures as follows, to wit:

38 In the Supreme Court of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON ET AL., Defendants in Error.

Affidavit in Support of Motion for Time to File Briefs.

Comes now H. H. Reynolds and on his oath, being duly sworn, says that he is one of the defendants in the above-entitled cause.

That at the time of the trial of said cause in the district court of Wyandotte county he owned jointly with his codefendant Frank Coatsworth twenty-three acres of the land included in this suit, the same being a portion of the Carey Rodgers allotment N. 278.

That at the time of said trial Junius W. Jenkins, an attorney of Kansas City, Kansas, was employed by affiant's granto- and codefendant John S. Stockton to defend, and that he did defend, this affiant's interests in said suit.

Affiant further states that he was informed and believed that said Jenkins was employed by said Stockton to defend his said interest as well in the supreme court after the case had been taken there on appeal, and that he did not learn until on the 8th day of December, 1897, that said Jenkins had been dismissed from his employment in this case, and that affiant's interest was not represented in the supreme court, and that the attorney appearing in the supreme court for said Stockton represented only the land embraced in the Lucy Cherloe allotment, in which last-named allotment the defendant Stockton alone is interested.

H. H. REYNOLDS.

Subscribed and sworn to before me this 10th day of December, 1897.

My commission expires February 20, 1899.

JOHN M. PHILLIPS,
[SEAL.] *Notary Public within and for Jackson County, Missouri.*

(Endorsed:) No. 10320. In the supreme court of the State of Kansas. John Schrimpscher *et al.*, plaintiffs in error, *vs.* John S. Stockton *et al.*, def'ts in error. Affidavit of H. H. Reynolds, in support of motion. Filed Dec. 11, 1897. Jno. Martin, clerk sup. court.

39 And be it also remembered that on the 11th day of December, 1897, the same being one of the judicial days of the regular July, A. D. 1897, term of the said supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the clerk's office of said court, to wit:

40 *Journal Entry of Decision.*

JOHN SCHRIMPCHER ET AL., Pl'ffs in Error,
vs.
JOHN S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiffs in error pay the costs of this case in this court, taxed at $10.75, and hereof let execution issue.

41 And be it also remembered that on the said 11th day of December, 1897, there *was* filed in the office of the clerk of the supreme court of the State of Kansas the syllabus & opinion of said court, which, with the endorsements thereon, are in words and figures as follows, to wit:

42 The following is the judgment and opinion of the highest court in the State of Kansas, the supreme court, in this case:

JOHN SCHRIMPCHER ET AL.
v.
JOHN S. STOCKTON ET AL. } No. 10320.

Indian lands—After restriction on alienation removed, title by prescription may be acquired in; after restrictions on the alienation of land patented to incompetent Wyandotte Indians were removed by the treaty of 1867, title thereto might be gained by occupancy under claim of ownership; and where, at the time the treaty took effect, the defendants were in the actual possession of such lands under void deeds from an incompetent Indian, and continued without interruption to hold such possession openly, adversely, and under claim of title until 1891, held that the statute of limitations is a complete bar to an action brought by the heirs of the incompetent Indian to recover the land.

Error from Wyandotte court of common pleas, Hon. T. P. Anderson, judge.

Opinion. Filed December 11, 1897. *Affirmed.*

J. M. Mason, for plaintiffs in error.
C. S. McLane, for defendants in error.

ALLEN, *J.:*

This was an action of ejectment brought by John Schrimpcher and more than forty others as plaintiffs, claiming to be the heirs of Carey Rodgers, deceased, a Wyandotte Indian, against John S. Stockton and ten other defendants. The plaintiff- sought to recover two tracts of land allotted to Wyandotte Indians in accordance with the treaty of 1855. One tract was conveyed by patent to Margaret

C. Cherloe. She was designated as a person belonging to the competent class, and the conveyance was absolute, with full power of disposition by herself and her heirs. The other was to Carey Rodgers, an incompetent Indian, the patent containing this condition:

"That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being; and with the further and express condition, as specified in the fourth article of the treaty with the Wyandotts of the 31 January, 1855, that the lands are not to be sold or alienated for a period of five years."

Answers were filed by various defendants, denying the plaintiffs' title and pleading the statute of limitations. The case was tried by the court and judgment was rendered for the defendants upon special findings of fact, from which we extract so much as seems necessary to an understanding of the questions decisive of the case.

On the first of June, 1859, a patent for allotment No. 42, containing sixty-four acres of land in Wyandotte county, was issued to Margaret C. Cherloe. On the first of September, 1859, a patent for allotment No. 278, containing 57.35 acres adjoining the first-mentioned tract, was issued to Carey Rodgers. Margaret C. Cherloe died prior to the thirty-first day of August, 1863, leaving Carey Rodgers, her grandson, as her only heir. On the last-mentioned date Carey Rodgers executed and delivered to Jesse Cooper and Mary E. Stockton a deed for the tract patented to his grandmother, reciting a consideration of $128. On the 15th of November, 1864, he executed and delivered to the same parties another deed for his own allotment, reciting a consideration therefor of $228. Carey Rodgers died intestate between the first and ninth days of December, 1867; he was then twenty-one years of age. The sole surviving next of kin of Carey Rodgers, following the male line, are Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams, who are among the parties named as plaintiffs. Immediately after the executions of the deeds from Carey Rogers to Cooper and Stockton the grantees took possession of all land described in the deeds, and they and their grantees have held actual, open, exclusive, and adverse possession of all said lands ever since the date of said deeds, and have paid all the taxes thereon, except in the years 1891 and 1892, when there was a kind of occupancy of a part of the land by persons claiming under the plaintiffs.

Under the law in force at that time the five plaintiffs named became the heirs of Carey Rodgers. Compiled Laws 1862, ch. 80, sec. 18 and 19. By the provisions of the treaty of 1855 with the Wyandottes they were to be divided into two classes, designated as
43 competants and incompetants. The lands allotted to those reported as competant to manage their affairs were to be patented to them unconditionally in fee-simple, but as to those not competant it was provided: "The patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years, and then not without the express consent of the President of the United States first being obtained, and the said patents

may be withheld by the Commissioner of Indian Affairs, so long as in his judgment their being so withheld may be made to operate beneficially upon the character and conduct of the individuals entitled to them. None of the lands to be thus assigned and patented to the Wyandotts shall be subject to taxation for a period of five years from and after the organization of the State government over the territory where they reside, and those of the incompetant classes, shall not be alienated or released for a longer period than two years, and shall be exempt from levy, sale, or forfeiture until otherwise provided by State legislation with the assent of Congress." Article 4 of treaty, 10 U. S. Statutes at Large, 1161.

In the subsequent treaty, concluded February 23rd, 1867, proclaimed on the 14th of October, 1868, it was provided as follows:

"ARTICLE 15. All restrictions upon the sales of lands assigned and patented to 'incompetant Wyandottes' under the fourth article of the treaty of one thousand eight hundred and fifty-five, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetants, shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order, or for taxes until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of the Interior; and, whereas, many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of one thousand eight hundred and fifty-five, it is agreed that a thorough examination and report shall be made under directions of the Secretary of the Interior, in order to ascertain the facts, relating to all such cases, and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require." 15 U. S. Statutes at Large, 517.

It is clear that the deed to his own allotment made by Carey Rodgers in 1864 was absolutely void. It is also clear that the deed made by him in 1863 to his grandmother's allotment was at least voidable, for he then was a minor, if it was not absolutely void because of his belonging to those classed as incompetant under the treaty.

It does not seem necessary to enter into any nice consideration of the effect of either of the conveyances executed by Carey Rodgers while he was yet a minor. We shall assume that the conveyed no title. It appears, however, that the grantees took and retained possession under them, claiming title in fee-simple. By the treaty of 1867, ratified and proclaimed in 1868, all restrictions on voluntary alienations of land patented to incompetants were removed; as to conveyances already attempted, the Secretary of the Interior was authorized to make inquiries and confirm, modify, or set aside the sales. It does not appear in this case that any action was ever taken by him with reference to this land. The state of the case, then, at the time this treaty took effect was that the lands belonged to the heirs of Carey Rodgers and were alienable by them. The defendants were in possession, claiming a title which they did not have. This

possession remained undisturbed for more than twenty years. We perceive no reason why the statute of limitations does not bar this action. The heirs of Carey Rodgers could have maintained an action to recover the land at any time after his death. So long as the land remained inalienable no title could be gained by adverse possession. Sheldon *v.* Donohue, 40 Kan., 346; McGannon *v.* Straightlege, 32 *id.*, 524; Fredrick *v.* Gray, 12 *id.*, 518. But when the lands became taxable and subject to unrestricted alienation by Rodgers' heirs, the owners were under the same necessity of exercising vigilence in asserting their rights that rested on other owners. The lands thereafter had no different legal status from those patented to white persons. The fact that those in possession claimed under void deeds does not militate against the title gained by occupancy. Fifteen years' open, exclusive, adverse possession under claim of title bars an action by the rightful owner, even though based on no written instrument. Anderson *v.* Burnham, 52 Kan., 454; Gilmore *v.* Norton, 10 *id.*, 491; Guinn *v.* Spillman, 52 *id.*, 496.

44 The findings with reference to the absence of the defendants from the State are insufficient to bring the case within the exception of the statute.

The judgment is affirmed.

45 And afterwards, on the 23rd day of December, A. D. 1897, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion for the rehearing of said cause, which, with the endorsements thereon, is in the words and figures as follows, to wit:

46 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants. } No. 10320.

Motion for Rehearing.

Now comes the plaintiff above named and moves the court to grant them a rehearing for the following reasons, to wit:

First. The court in its former opinion ignored the proposition of law that the entry under the void deeds of 1863 and 1864 was an entry in subordination to the title of the original owner, Carey Rodgers, and that such entry made Stockton and Cooper tenants from one period to another under authority of Smyth *vs.* Henry, 41st Federal Reporter, 706, and where the holding was in subordination at its inception it would so continue until the contrary is shown, and so did continue, under findings 16, 28, and 31, pages 20 and 21 of the Record, which findings the court has failed to notice. See Dewey *vs.* McClain, 7 Kansas, page 126; Carithers *vs.* Weaver, 7 Kansas, 110.

Wherefore plaintiffs pray for a rehearing.

JAMES M. MASON,
Att'y for Pl'ff.
F. E. & J. A. SMITH,
Attorneys for Plaintiff.

(Endorsed:) No. 10320. John Schrimpscher *vs.* John S. Stockton *et al.* Motion for rehearing. Filed Dec. 23, 1897. John Martin, clerk sup. court. Mason & Mason, att'ys for pl'ff-.

47 And also be it remembered that on the 1st day of February, A. D. 1898, the same being one of the judicial days of the regular January, A. D. 1898, term of the said supreme court of the State of Kansas, said court being in session at its court-room, in the city of Topeka, there being present the Hon. Frank Doster, chief justice, and the Hon. William A. Johnston and the Hon. Stephen H. Allen, associate justices, and Jno. Martin, Esq., clerk of said court, the following proceeding was had and remains of record in the office of the clerk of said court, to wit:

48 JOHN SCHRIMPSCHER ET AL., Pl'ffs in Error,
vs.
JOHN S. STOCKTON ET AL., Def'ts in Error. } No. 10320.

Now comes on for decision the petition for a rehearing of this cause, and thereupon it is ordered that said petition be denied.

49 And be it also remembered that on the 22nd day of March, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas the affidavit of J. L. Williams; which affidavit, with the endorsements thereon, is in words and figures following, to wit:

50 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs,
vs.
JOHN S. STOCKTON ET AL., Defendants. } No. 10320.

Come- now J. L. Williams, a real-estate agent of Kansas City, who, being duly sworn according to law, depose- and say-:

That *they are* well acquainted with the subject-matter in dispute in this action and with the value of real estate in that locality, and that said subject-matter in dispute consists of about sixty-seven acres of land; that the value of said subject-matter *of* dispute exceeds the sum of ten thousand ($10,000.00) dollars.

That the value of said real estate is $12,000.00, and that the northerly 34.41 acres thereof and the southerly 33.35 acres are about of equal and uniform value per acre, and that either of said tracts of land last mentioned exceed- in value the sum of five thousand ($5,000.00) dollars.

J. L. WILLIAMS.

Subscribed and sworn to before me this 5th day of December, 1898.

[SEAL.] W. H. BIGGER,
Notary Public.

My commission expires 16 February, 1899.

(Endorsed on back:) 10320. Affidavit of J. L. Williams as to value of premises in controversy. Filed March 22, 1899. Jno. Martin, clerk supreme court, by F. J. Fritch, dep.

51 And on the 22nd day of March, 1899, there was filed in the office of the clerk of the supreme court of Kansas a petition for a writ of error in said cause, which, with the allowance thereof, is in words and figures as follows, to wit:

52 In the Supreme Court of the United States.

JOHN SCHRIMPSCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, and Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, Minor, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree; Richard M. Splitlog, for Self and as Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors; Malinda W. Splitlog, and Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandotte Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

Petition for a Writ of Error.

United States of America to the honorable chief justice of the State of Kansas:

Plaintiffs in error above named respectively show that on the 11th day of December, 1897, the supreme court of the State of Kansas rendered a final judgment against your petitioners in a certain cause, wherein the plaintiffs in error above named were plaintiffs and the defendants in error above named were defendants, affirming the judgment of the court of common pleas of the county of Wyandotte, State of Kansas, in favor of said defendants and against your petitioners for the recovery of the following-described lands, situated in

the county of Wyandotte and State of Kansas, to wit, east 67.65 acres of —, following, to wit:

Commencing at the center of section 27, township 10, range 25, thence north 64 poles, thence west 160 poles, thence south 64 poles, thence east 12 poles, thence south 62 poles, thence east 148 poles, thence north 62 poles to the beginning, containing 121.35 acres, more or less.

Comes now the said plaintiffs in error, by James M. Mason and L. J. Mason, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

That by the record aforesaid it appears that the judgment and decision aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error.

That said supreme court of the State of Kansas is the highest court of said State in which a decision in said suit could be had.

And your petitioners claim the right to remove said judgment and proceedings to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because the title of the plaintiffs to the above-described land and their claim of title thereto was acquired and derived under treaties of the United States to and with the Wyandotte tribe of Indians, to wit:

The treaty concluded on the 31st day of January, A. D. 1855, between the commissioners on the part of the United States and said tribe of Indians, and the modification of that treaty under article 15 of the 23rd of February 1867, ratified and proclaimed by the same parties in A. D. 1868.

That the record herein presents a Federal question upon the proper construction of said treaties and the rights acquired by plaintiffs as heirs-at-law of the patentee of the United States Gov-
53 ernment under the provisions of said treaties, as is more fully shown in accompanying affidavit marked Exhibit "A," hereto attached and made a part hereof.

And the decision of said State court was directly against the validity of the said title acquired under said treaty under which plaintiffs in error claim title to said premises and directly in favor of a title gained by operation of the statutes of limitation of the State of Kansas in contravention to the proper construction of said treaties and of the paramount laws of the United States, and under which title, by operation of the said laws of Kansas, defendants in error claim, and which title plaintiffs in error aver is void and founded on a misconstruction of said treaties, as shown by the record herein, which is hereto appended and made a part of this petition for a writ of error.

J. M. MASON,
SMITH & BETTS,
Att'ys for Pl'ffs in Error.

F.

54 Let the writ of error issue as prayed for — the petition of plaintiffs in error, and it appearing to the court by the record and proofs in this case that the plaintiffs are the heirs-at-law of Carey Rodgers, deceased, an incompetent Indian under the Wyandott treaty of January 31st, 1855, and Feb'y 15th, 1867, ratified and proclaimed in 1868, and by the findings in the record in this case *that Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams are the sole heirs-at-law and next of kin of the deceased Carey Rodgers, who died seized of the land in dispute in this action, and that the five plaintiffs last named are the only parties interested in prosecuting this action, herefore it is hereby ordered that a severance be had of said last-named plaintiffs from the others in the supreme court of Kansas, and said Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr., and Mary D. Williams are by this order of severance authorized to prosecute their separate appeal and writ of error in this cause to the Supreme Court of the United States.*

Dated this 8 day of April, 1899.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

[Endorsed:] 10320. Petition for writ of error. Filed March 22, 1899. Jno. Martin, clerk supreme court, by F. J. Fritch, dep.

55 And also, on the 8th day of April, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond in the above-entitled cause; which said bond, with the approval & endorsements, is in words and figures as follows, to wit:

56 In the Supreme Court of the United States.

JOHN SCHRIMPCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, *James Armstrong, Catherine Armstrong;* Service Kayrahoe, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winnie, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard Splitlog, for Self and as Guardian and Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandott Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerland, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

Know all men by these presents that we, Bracknet Nail Whitetree, Frank Whitetree, A. J. McKinney, and Thomas H. Wimpey, of Tiff City, in the county of McDonald and State of Missouri, are held and firmly bound unto —— McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred ($200.00) dollars, current money of the United States, to be paid to the said —— McKenney, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the supreme court of the State of Kansas, in a suit depending in said court between the plaintiffs and defendants above named, a judgment was rendered against the said plaintiffs, and the said plaintiffs having obtained an order allowing an appeal of said cause and writ of error to the Supreme Court of the United States, and filed a transcript of said cause from the records of said court in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid action:

Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said —— McKenney, clerk of said Supreme Court of the United States, his

heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the said —— McKenney, clerk as aforesaid, and charged to the said plaintiffs in the prosecution of the said appeal or writ of error in said cause, then the above obligation to be void; otherwise to remain in full force and virtue.

his
BRACKNET NAIL x WHITETREE. [L. S.]
mark.
FRANK WHITETREE. [L. S.]
A. J. McKINNEY. [L. S.]
THOS. H. WIMPEY. [L. S.]

Witness- to mark:
SARAH WHITETREE.
DAN. HUCKINS.

57 UNITED STATES OF AMERICA.

STATE OF MISSOURI, } ss:
County of McDonald, }

A. J. McKinney and Thomas H. Wimpey, being each duly sworn, deposes and says and each for himself saith that he is worth two hundred ($200) dollars over and above all just debts, liabilities, and exemptions.

A. J. McKINNEY.
THOS. H. WIMPEY.

Subscribed and sworn to before me this 3d day of March, 1899.

[Seal of Dan. Huckins, Notary Public, McDonald County, Mo.]

DAN. HUCKINS,
Notary Public.

Commission expires Jan. 27, 1903.

The above bond and sureties thereto duly approved.

FRANK DOSTER,
Chief Justice.

[Endorsed:] 10320. Cost bond. Filed April 8, 1899. Jno. Martin, clerk sup. court, by F. J. Fritch, dep.

58 In the Supreme Court of United States.

JOHN SCRIMPCHER ET AL. }
vs. }
JOHN S. STOCKTON ET AL. }

Error from supreme court of State of Kansas.

Be it remembered that on the 8th day of April, 1899, there was filed in the office of clerk of the supreme court of the State of Kansas an assignment of error which is in words & figures following, to wit:

59 In the Supreme Court of the United States of America.

JOHN SCHRIMPCHER, SILAS SMITH, ELIZA DAVIS; AMOS CROW, Annie Crow, Moses Crow, Samuel Crow, Minors, by Their Guardian and Next Friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, Minor, by James Armstrong, His Guardian and Next Friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, Minors, by Their Guardian and Next Friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for Self and as Guardian and Next Friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, Minors, and Joseph Schiffbauer, for Self and as Guardian and Next Friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, Minors, and Malinda W. Splitlog, Polly Whitecrow, Heirs-at-law of Carey Rodgers, Deceased, a Wyandotte Indian, Plaintiffs in Error,

vs.

JOHN S. STOCKTON, FRANK E. POWELL, FRANK COATSWORTH, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, Defendants in Error.

In error.

Of the October term, in the year of our Lord one thousand eight hundred and ninety-nine.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the above-named plaintiffs in error, by their attorneys, James M. Mason and L. J. Mason, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. That by the record aforesaid it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error (corresponding to 1st and 3rd assignments of error in the State court).

II. That the supreme court of the State erred in sustaining the trial court in the following findings, the same being the XIV finding of fact as classed by the trial court (but in view of the other findings being really more a conclusion of law than of fact), viz:

"XIV. That the defendants and their grantors acted in good faith in making the purchase of said lands (the lands in question in this suit) and in taking the deeds thereto of date Aug. 31st, 1863, and Nov. 15, 1864, April 14, 1877."

III. The supreme court of the State erred in holding that said grantees took, if anything, otherwise than as lessees of said lands in subrogation to the superior title of the Indian owner and patentee, Carey Rodgers, and his heirs, or took anything therein that could be the basis of a title by prescription or limitation in their favor, howsoever long they might hold the same under such quality of possession.

IV. The supreme court of the State erred in sustaining the trial court in its holding that the treaty between the United States and the Wyandott tribe of Indians of 1867, ratified and proclaimed in 1868, modified the restrictions of the Wyandott treaty of 1855 in regard to involuntary alienation of said lands assigned and patented or otherwise belonging to incompetent Indians under said last-named treaty.

V. That the supreme court of the State erred in holding and sustaining the trial court in holding that any State statute of limitations could take hold of said lands and interfere with the primary disposal of the soil by the United States or become the foun-
60 dation for a title by prescription in favor of defendants in error so long as the said lands remained in the said incompetent or in the heirs of the blood of said tribe, and in that way subvert the provisions of the treaties existing between the United States and said Indians against alienation by operation of law or otherwise than by voluntary sale under the provisions of the supplementary treaty of 1867–'8. See findings of trial court XIII and conclusions of law 1st and 2nd, followed by final judgment.

And the said plaintiffs in error above named, and each and all of them, pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that said plaintiffs in error may be restored to all things which they have lost by occasion of the said judgment. Witness a copy of the record hereto attached, marked Exhibit X.

JAMES M. MASON,
L. J. MASON,
Attorneys for Plaintiffs in Error.

[Endorsed:] 10320. Assignment of errors. Filed April 8, 1899. Jno. Martin, clerk sup. court, by F. J. Fritch, dep.

61 And thereafter, to wit, on the 8th day of May, A. D. 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause; which said writ of error was in words and figures following, to wit:

62 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the judgment of a plea which is in the said supreme court of Kansas, before you or some of you, being the highest court of law or equity of the said

State in which a decision could be had in the said suit between John Schrimpcher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors, and Malinda W. Splitlog, Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, plaintiffs in error, and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, defendants in error, wherein was drawn in question the validity of the proceedings and authority exercised under the United States and the decision was against its validity, and wherein was drawn in question the validity of the title of the plaintiffs in error to certain land acquired and derived under a treat- between the United States and the Wyandott tribe of Indians, concluded on the 31st day of January, A. D. 1855, between the commissioners on the part of the United States and said tribe of Indians, and the modification of that treaty under article 15 of the 23rd of February, 1867, ratified and proclaimed by the same parties A. D. 1868, and by an authority thereunder exercised under the United States, and the decision was against such validity of said title and said authority, to the great damage of the plaintiffs in error above named, and each and all of them, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday in October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 8th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed this April 29, 1899.
FRANK DOSTER,
Chief Justice Supreme Court of Kansas.

[Endorsed:] No. 10320. John Schrimscher *et al.*, pl'ffs in error, *vs.* John S. Stockton *et al.*, def'ts in error. Writ of error. Filed May 8th, 1899. Jno. Martin, clerk supreme court. F. J. Fritch, dep.

63 And thereafter, to wit, on the 27th day of June, A. D. 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the acknowledgement of service thereof endorsed thereon and proof of service attached thereto, is in words and figures as follows, to wit:

64 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, and their attorney of record, Junius W. Jenkins, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, in a certain action wherein John Schrimpscher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, and Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors; Malinda W. Splitlog, and Polly Whitecrow, heirs-at-law of Carey

Rodgers, deceased, a Wyandotte Indian, are plaintiffs in error and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned shall not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 8th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Witness my hand and official signature, at Topeka, the capitol of the State of Kansas, on the 8th of May, A. D. 1899.

[Seal Supreme Court, State of Kansas.]

JNO. MARTIN,
Clerk of the Supreme Court of the State of Kansas.

65 [Endorsed:] 10320. Citation. Filed Jun- 27, 1899. Jno. Martin, clerk supreme court.

Received copy of the within June 3, 1899.

C. S. McLANE.

Filed Jun- 27, 1899.

JNO. MARTIN,
Clerk Supreme Court.

STATE OF KANSAS, }
County of Wyandotte, } *ss:*

James M. Mason, being duly sworn, deposes and says that he did, on the 2d day of June, 1899, duly serve the within and foregoing citation on Junius W. Jenkins, the attorney of record in this cause, within named as such, and on the 3d day of June, 1899, duly served the same on J. S. Stockton and C. S. McLane by delivering to each of above-named persons a true copy thereof.

JAMES M. MASON.

Subscribed and sworn to before me this 5th day of June, 1899. My commission expires M'ch 15th, 1903.

[Seal of W. T. Hovey, Notary Public, Wyandotte County, Ks.]

W. T. HOVEY,
Notary Public.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the judgment of a plea which is in the said supreme court of Kansas, before you

or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between John Schrimpsher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors, and Malinda W. Splitlog, Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, plaintiffs in error, and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, defendants in error, wherein was drawn in question the validity of the proceedings and authority exercised under the United States and the decision was against its validity, and wherein was drawn in question the validity of the title of the plaintiffs in error to a certain land acquired and derived under a treaty between the United States and the Wyandotte tribe of Indians, concluded on the 31st day of January, A. D. 1855, between the commissioners on the part of the United States and said tribe of Indians, and the modification of that treaty under article 15 of the 23rd of February, 1867, ratified and proclaimed by the same parties A. D. 1868, and by an authority thereunder exercised under the United States, and the decision was against such validity of said title and said authority, to the great damage of the plaintiffs in error above named, and each and all of them, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 9 day of October, 1899, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 13 day of Sept., in the year of our Lord one thousand eight *hundred and ninety-nine.*

GEO. F. SHARITT,
Clerk of the Circuit Court of the United States for the District of Kansas.

This writ allowed this Sept. 9, 1899.
FRANK DOSTER,
Chief Justice, Kansas.

[Endorsed:] 10320. Writ of error. Filed Sep. 15, 1899. Jno. Martin, clerk supreme court.

67

Citation.

UNITED STATES OF AMERICA, *ss:*

To John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, the Gossard Investment Company, and their attorney of record, Junius W. Jenkins, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, in a certain action wherein John Schrimpscher, Silas Smith, Eliza Davis; Amos Crow, Annie Crow, Moses Crow, and Samuel Crow, minors, by their guardian and next friend, Annis Crow, and Isaac Peacock, James Peacock, James Armstrong, Catherine Armstrong; Service Kayrahoe, minor, by James Armstrong, his guardian and next friend; Susan Whitecrow, Jacob Whitecrow, Clara Whitecrow, Jerry Whitecrow, and Naomie Kayrahoe, minors, by their guardian and next friend, Malinda Splitlog; Alfred Whitecrow, Jane Sarahass, Amelia Cherloe, Bracket Nail Whitetree, Lucy A. Winney, John Barnett, Susan Whitetree, Mary Nichols, Joseph Whitecrow, John Kayrahoe, Margaret Pipe, Mary D. Williams, and Frank Whitetree, Eva Whitetree; Richard M. Splitlog, for self and as guardian and next friend of Alexander Splitlog, Ida Splitlog, Inez Splitlog, Julia Splitlog, and John L. Splitlog, minors, and Joseph Schiffbauer, for self and as guardian and next friend of Minnie Schiffbauer, Robert Schiffbauer, and Fritz Schiffbauer, minors; Malinda W. Splitlog and Polly Whitecrow, heirs-at-law of Carey Rodgers, deceased, a Wyandotte Indian, are plaintiffs in error and John S. Stockton, Frank E. Powell, Frank Coatsworth, Hiland H. Reynolds, H. N. Page, William Westerlund, J. Oswald Clarke, Anglo-American Cotton Milling Company, Albert Willetts, Herman Erdman, The Gossard Investment Company, are defendants in error, to show cause,

if any there be, why the judgment in the said writ of error mentioned shall not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas, this 15 day of September, in the year of our Lord one thousand eight hundred and ninety-nine.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Witness my hand and official signature, at Topeka, capitol of the State of Kansas, on the fifteenth day of September, 1899.

[Seal Supreme Court, State of Kansas.]

JNO. MARTIN,
Clerk of the Supreme Court of the State of Kansas.

68 [Endorsed:] 10320. Citation.

STATE OF KANSAS, } ss:
County of Wyandotte, }

James M. Mason, of lawful age, being duly sworn according to law, deposes and saith that he served a true copy of the within citation on Junius W. Jenkins and J. S. Stockton at their respective offices, in Kansas City, Kas., on the 20th day of September, 1899.

JAMES M. MASON.

Subscribed and sworn to before me this 20th day of September, 1899.

[Seal of W. T. Hovey, Notary Public, Wyandotte County, Ks.]

W. T. HOVEY,
Notary Public.

Com. expires M'ch 15, 1903.

I hereby acknowledge that a copy of the within citation was served on me this 23rd day of September, 1899.

C. S. McLANE.

I hereby acknowledge that a copy of the within citation was served on me this 23rd day of September, 1899.

HILAND H. REYNOLDS.

Served copy on Junius W. Jenkins Sept. 20, 1899.

——.

69 In the Supreme Court of the State of Kansas.

JOHN SCHRIMPSCHER ET AL., Plaintiffs in Error,
vs.
JOHN S. STOCKTON ET AL., Defendants in Error. } No. 10320.

I, John Martin, Esq., clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript of the pleadings and papers filed and of all proceedings had in the above-entitled cause, as the same remain now on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, hereto affixed, at my office, in the city of Topeka, this 3rd day of Oct., A. D. 1899.

JNO. MARTIN,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No., 17,559. Kansas supreme court. Term No., 154. John Schrimpscher, Silas Smith, Eliza Davis, Amos Crow, *et al.*, plaintiffs in error, *vs.* John S. Stockton, Frank E. Powell, Frank Coatsworth, *et al.* Filed November 11th, 1899.

No. 19 –

Brf. of Mason v Springer

Office Supreme Court U. S.
FILED
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JAMES H. Mc

Supreme Court of the United States

Filed Oct. 15, 1901.

OCTOBER TERM, 1901.

No. 154.

JOHN SHRIMPSHER, SILAS SMITH, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN S. STOCKTON, ET AL.

STATEMENT, ASSIGNMENT OF ERROR, AND BRIEF.

JAMES M. MASON,
CHAS H. NEARING,
Att'ys for Pff's in Error.

WM. M. SPRINGER,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 154.

JOHN SHRIMPSHER, SILAS SMITH, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN S. STOCKTON, ET AL.

STATEMENT, ASSIGNMENT OF ERROR, AND BRIEF.

STATEMENT.

The suit is one of ejectment, originating in the District Court of Wyandotte County, Kansas. The answers were general denials and a plea of both the three and fifteen year statute of limitation; a jury was waived and the cause submitted to the Court, sitting as a jury. Judgment was rendered for the defendant, an appeal taken to the Supreme Court of the State of Kansas, which Court affirmed the judgment of the lower Court. The cause was then brought to this Court by a writ of error. The facts are as follows: One Carey Rogers was an incompetant Wyandotte Indian, being an orphan, and was allotted, under the treaty of 1855, the land in controversy, which was conveyed to him by patent, dated September 1, 1859, which patent contained the usual clauses against alienation and subject to condition of fourth article of treaty of 1855, (pages 12-13 record.) The record also contains the patent and finding of fact pertaining to another tract of land, patented to Margaret A. Charloe, the grandmother of Carey Rogers, which subsequently descended to

him. (Page 8 record.) Settlement of this property has since been made, it is not now involved in the case.

The only property and facts now in question is that described in and pertaining to the patent of September 4, 1859, (pg. 12-13), abstract. On November 15, 1864, Carey Rogers, who was then 18 years of age, (finding of fact, question 20, pg. 20 record,) conveyed the property in question to grantors of defendants who thereafter entered into possession of the same.

This deed was never approved by the Secretary of Interior, Carey Rogers died in 1867, leaving plaintiffs Frank Whitetree, Bracket N. Whitetree, Mary Nichols, Silas Smith, Jr. and Mary D. Williams, his sole surviving next of kin following the male line. (Question 32, pg. 20, record.)

On April 4, 1877, Lucy A. Charloe, Jane Sarahess and others, executed and delivered to Byron Judd a deed to the property in question, (pg. 19 record.) On September 27, 1877, Byron Judd and wife executed deed to Mary E. Stockton who subsequently executed deed to defendant.

The court found the grantors to this deed were not the next of kin of Carey Rogers following male line question, (33 pg. 20, abstract.)

The trial court made the following finding of fact pertaining to the possession of the property in question (paragraph XIII, pg. 17, record.)

"Immediately after the execution of said deed from said Carey Rogers to Jesse Cooper and Mary E. Stockton of date August 31, 1863, (this being to property not now involved,) and November 15, 1864, said grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds, and make per-

manent improvements thereon and they and their grantees have had and held open, peaceable, quite, undisturbed, actual notorious, exclusive and adverse possession of all said lands except as shown in finding no 15 claiming title thereto ever since the date of said deeds and have paid all taxes, cleared said land of timber and cultivated the same by tenants.

XV. On the first of March, 1891, there was no building or residence upon the property in controversy, the residence which had been upon the same having been destroyed by fire. The land in controversy was not cultivated that year by the defendants. except a portion, some 15 or 20 acres in the northwest corner thereof, which was leased in writing from the defendants. Upon the north half of the land in controversy, one James M. Mason, claiming to represent the plaintiff as their agent and attorney, made a lease in writing in the first day of March, 1891, to Jay Ikler and Adam Berlin to the land in controversy in this action and by virtue thereof, said Ikler and Berlin executed leases to certain other persons to certain portions of said tract and said Jay Ikler and Adam Berlin and their subtenants, during the spring of 1891 plowed and planted about 35 acres of said land, and after the same was planted, there was a rise in the river and a portion of the land was overflowed so that very little crops was raised during the year subsequent to the overflow, and late in the summer Adam Berlin sowed millet and raised a crop thereof upon about ten acres; also one Davis sowed some millet. but there was for some reason no result therefrom, and it is disputed whether Davis cultivated what he did under the plaintiffs or defendants, he probably at different times verbally

recognized both parties as his landlord, but no person received rent from him.

"All that Davis cultivated as well, as a portion of that cultivated by the other persons who occupied under the lease made by Mr. Mason, was on a portion of the land that was leased by defendants to A. M. Willetts. Neither Mason or any tenant claiming through him under the plaintiffs, occupied or cultivated any portion of said land at any time except as above stated. In 1892 one person claiming under the plaintiffs attempted to plow thereon but was prevented by the defendants.

The defendants claimed possession by virtue of the deed from Carey Rogers above referred to, also a deed to one Byron Judd, dated April 4, 1877. but the deed to Judd was not executed by the heirs of Carey Rogers (see finding of fact, question 33, pg. 20, abstract.)

"The Supreme Court of Kansas held (page 33 record) that the deed by Carey Rogers to grantees of defendant were void. By the treaty of 1867 ratified in 1868, all restrictions of voluntary alienation of land patented to incompetents were removed. As to conveyances already attempted the Secretary of the Interior was authorized to make inquiries and confirm, modify or set aside the sales. It does not appear in this case that any action was ever taken by him in reference to this land. The state of the case then, at the time this treaty took effect, was that the lands belonged to the heirs of Carey Rogers and were alienable by them. The defendants were in possession claiming a title which they did not have. This possession remained undisturbed for more than twenty years. We see no reason why the statute of limitation does not bar this action."

ASSIGNMENT OF ERRORS.

1st. The court erred in sustaining the trial court in the following finding. (the same being the XIV.) The defendants and the grantor acted in good faith in making the purchase of said lands and in taking the deeds thereto of date August 31, 1863 and November 15, 1864, April 14, 1877.

II.

The court erred in holding that the grantees of Carey Rogers took anything from such conveyance upon which a title by prescription or limitation could be based.

III.

The court erred in sustaining the trial court That the treaty of 1867 modified the treaty of 1855 in regard to alienation of said land patented to incompetent Indians and applied to the property in question.

IV.

The court erred in holding the statute of limitation of the State of Kansas applied to the land in question and was a bar to this claim.

POINTS AND AUTHORITIES.

I.

Plaintiff being Indian are not subject to statute of limitation.

McGannon vs. Straightlege,	32 Kan. 524.
Sheldon vs. Donohue,	40 " 346.
O'Brien vst Bugbee,	46 " 1.
Gibson vs. Choteau,	80 U. S. 92.
Kansas Indians,	72 " 737.
Stevens vs. Smith,	77 " 321.

II.

That the deed from Carey Rogers of November 15, 1864, (pg. 13 record,) under which defend ant hold is void not having been approved by the Secretary of Interior.

III.

That said deed will not constitute sufficient color of title to enable defendants to claim adverse possession.

Gibson vs, Choteau,	13 Wall. 99.
Irvin vs. Marshall,	20 How. 558.
Gibbs vs. Gas Co.,	130 U. S. 412.
Livingston vs. The Peru Ice Co.,	9 Wend. 511.
Taylor vs. Brown,	5 Da. 343.
Zeller vs. Eckhart,	4 How. 389.
Libby vs. Clark,	118 U. S. 250.
Smythe vs. Henny,	41 Fed. Rep. 705.
Diffenback vs. Hawes,	115 U. S. 423.

III.

No additional rights accured to defendants by the death of Carey Rogers.

IV.

No title by prescription or limitation under any state statute could be acquired as against the right of the Secretary of the Interior to investigate and modify or declare void the conveyance in question; hence the state of limitation could not begin to run, if at all, until after such action by the Secretary of Interior.

Gibson vs. Choteau, 13 Wall. 99.

V.

The delay of the government in acting on the property in question is a matter for which plaintiffs are not responsible.

Gibson vs. Choteau, 13 Wall. 99.

VI.

Plaintiffs being heir of Carey Rogers inherit the property in question.

Opin. Supreme Court, Kans., page 32 record.

Complied Law Kans., 1862 Ch. 80, Sec. 18 and 19.

ARGUMENT.

I.

Will the statuute of limitation run against plaintiffs.

This depends upon their status whether they had become citizens under the treaty of 1855 or were wards of the nation, dependent upon the government for protection and support. The record is silent on that point and it must be determined by the treaties, and the rules as to presumption established by the courts.

The treaty of 1855, Art. 1 states.

"The Wyandotte Indians having become sufficiently advanced in civilization and being desirous of becoming citizens, it is hereby agreed and stipulated, that their organization, and relations with the United States, as an Indian tribe shall be dissolved and terminated, on the ratification of this agreement except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein, and from and after the date of such ratification, thesaid Wyandotte Indians, and each and every one of them, except as herein after provided, shall be deemed and are hereby declared to be citizens of the United States to all iutents and purposes, and shall be entitled to all the right, privileges, and immunities of such citizens and shall in all respect be subject to the laws of the United States and the Territory of Kansas in the same manner as other citizens of said Territory and the jurisdiction of the United States, and of said Territory shall be extended over the Wyandotte Country in the same manner as other parts of said Territory. But such of the said Indians as may so desire and make application accordingly to the commissioner herein provided for, shall be ex-

empt from the immediate operations of the proceeding provisions extending citizenship to the Wyandotte Indians and shall have continued to them the assistance and protection of the United States, and an Indian agent in their vicinity, for such limited period or periods of time, according to the circumstances of the case, as shall be determined by the Commissioner of Indian affairs, and on the expiration of such period or periods, the said exemptions, protections and assistance shall cease, and said persons shall then also becomecitizens of the United States, with all the rights and privileges, and subject to all the obligations above stated and defined."

The foregoing treaty might justify the presumption plaintiffs were citizens of the United States, had it been carried out. Upon the dissolution of the tribe there could have been no further treaties with them, but the government did recognize and treat with them in 1867, which treaty in its preamble states, "A portion of the Wyandotte, parties to the treaty of 1855, although taking lands in severally, have sold said lands and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization while others who did became citizens, are unfitted for the responsibilities of citizenship. And, whereas, the Wyandottes treated with in 1855, have just claims against the government, which will enable the portion of their people wherein referred, to begin a new tribal existence. Therefore, it is agreed.

"Art. 13. The United States will set apart for

the Wyandottes, for their future home, the land ceded by the Senecas in the first article hereof and described in said article to be owned by the said Wyandottes in common. And the Secretary of the Interior is hereby authorized and required to appoint three persons whose duty it shall be to ascertain and report to the department the amount of money if any, due by the United States to the Wyandotte Indians under existing treaty. Stipulations and the items mentioned in schedule "A" appended to this treaty, and the report of the persons so appointed, with the evidence taken, shall be submitted to Congress for action at its next session. Aregister of the whole people resident in Kansas and elsewhere, shall be taken by the agent of the Delawares, under the direction of the Secretary of the Interior, on or before the first of July, 1867, which shall show the names of all who declare their desire to be and remain Indians, and in a tribal condition, together with incompetents and orphans as described by treaty of 1855, and all such persons and those only shall hereafter constitute the tribe."

By this treaty the government recognized the fact that the treaty of 1855 had not been carried out, the Wyandotte Indians had not become citizens or at least maintained sufficient tribal organization as to enable the government to treat with them through their representatives and not in severalty That they had not "*not been compelled to become citizens*," That the were still poor and while, some had become citizens, they were unfitted for the responsibilities of citizenship and then settled all

questions of tribal existence by re-establishing the tribe. This being true we feel this court would be justified in or extending to them the protection given to other tribal indians.

If plaintiffs had become citizens, and become sufficiently civilized to care for themselves, their condition was the exception to that recognized by the treaty of 1867, and the burden was upon the defendants to show they were within that exception.

That, being tribal Indians or unable to assume the responsibility of citizenship, no statute of limitation will run against them is so clearly established as to need neither discussion nor authorities.

II.

That the deed from Carey Rogers of November 15, 1864, (page 13, record,) under which defendants hold, is not having been approved by the Secretary of the Interior will not be disputed.

III.

That the same will not constitute sufficient color of title to enable defendants to claim adverse possession is equally well established.

Gibson vs. Choteau, 13 Wall. 99.
Irvin vs. Mitchell, 20 How. 558.
Livingston vs. The Peru Iron Co., 9 Wend. 511.
Gibbs vs. Gas Co., 130 U. S. 412.

Taylor vs. Brown, 6 Da. 339.
Ziller vs. Eckhart, 4 How. 389.
Libby vs. Clark, 118 U. S. 250.
Smythe vs. Henry, 41 Fed. Rep. 706.
M. Gibbs vs Gas Co., 130 U. S. 412.

This court adopts the rule in Man. It states: "The rule of law said Parker C. S. in Russell vs. DeGrand 15 Mass. 35, 39, is of universal operation, that none shall, by the aid of a Court of Justice, obtain the fruits of an unlawful bargain."

No adverse possession can be founded upon a possesion under a deed obtained by fraud or where there is an express prohibition of alienation so that the deed is absolutely void.

Gibson vs. Choteau, 13 Wall. 99.
Irvin vs. Mitchell, 20 How. 558.
Livingston vs. The Peru Iron Co., 9 Wend. 511.

In case of Taylor vs. Brown, 5 Da. 344, the court states:

"In the case at bar the appellant Brown" came into the possession of the land under a deed that its owner had nopower to make, and, as the findings of the court show, he knew his grantor was an Indian at the time of the transaction, and therefore he is to be held to have known, at leastin legal effect, of the disability resting on his grantor at the time of the pretended conveyance, for all persons are persumed to know the law. We cannot, therefore, say that he was in possession in good faith, under color of title. To hold otherwise would defeat the evident intention of the statute, and permit the ap-

pellant Brown, with the law staring him in the face, to initiate a species of deed aud color of title, which would in effect nulify and defeat the protection sought to be thrown around this Indians by the government, and to abrogate the conditions upon which the government parted with its title to the land.

IV.

The grantors of Carey Rogers did not take in good faith the patent to him, contained the limitation upon his alienation of the property, they knew that he was an incompetent Indian and had no right to convey. They did not enter into possession of the property with any reason for belief that their possession would open into a holding. They new the deed under which they claimed was void without the approval of the Secretary of the Interior. They could not hope to circumvent the treaty and obtain title by possession which they could not obtain under the law. No state legislation could abridge the right of the government through its proper office to approve or disapprove these conveyances Gibson vs. Choteau, 13 Wall. 99. Their possession was an absolute nullify so far as confering any right was concerned unless they acquired additions rights upon the death of Carey Rogers or by the treaty of 1867.

No additional rights accured to defendants by the death of Carey Rogers. They acquired nothing thereby and the only question whether his heirs took the property subject to the same conditions and limitations as held by him. If they were tribal In-

dians or otherwise incompetent, then they are entitled to the same protection and subject to the same limitations as Carey Rogers himself, their status would be unchanged, and no possession for any period of time would ripen into a title. There is no provision in the treaty of 1855, whereby property patented to an incompetent Indian is relieved of the limitation upon its alienation upon its passing into the possession of a competent Indian or a citizen. Even if these heirs were citizens the property is subject to the same limitation until relieved by act of Congress.

In Maynes vs. Veale, 20 Kan. 374. It is held "There is nothing in the powers conferred by citizenship independent of the treaty, which of themselves, releases the restrictions upon alienations and if these restrictions are discharged when the allotters become citizens, such discharge or release must be found in some of the treaties."

This being an action at law no question of laches can arise.

V.

The remaining question is whether or not the treaty of 1867 is retractive. Its language as well as the authorities would seem to indicate it was not. The provislon in the treaty is as follows:

Art, 16. "All restrictions upon the sale of land assigned and patented to incompetent Wyandottes under the 4th article of the treaty of 1855, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made, under decree of any

court or otherwise for or on account of any claim, judgment execution or order or for taxes until voluntarily sold to the patentee or his or her heirs, with the approval of the Secretary of the Interior; and whereas many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855, it is agreed that a thorough examination and report shall be made under direction of the Secretary of the Interior, in order to ascertain the facts relating to all such cases and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require."

It is not contended that Carey Rogers or his heirs, made any conveyances after the treaty of 1867, it must be conceded that up to that time defendants or their grantor had acquired no rights to or intesest in the property in question, either by grant or otherwise. If in 1867 defendant had been in possession of the property in question for the statutory period of 15 years or any other period the State of Kansas might have enacted, it will not be claimed they had then acquired a title thereto.

If at that time the statute of limitations had commenced to run then they might have acquired a title and asserted the same against the action of the Secretary of the Interior if he had attempted to modify the sale as provided in the treaty of 1867. That this could not be done needs no discussion.

The treaty was not retroactive, Smith vs. Stevens, 10 Wall. 327. This court held: "It is

hardly necessary to say that a joint resolution passed nearly two years after the transaction, cannot relate back and give validity to a conveyance which. when executed, was void, nor have we any reason to suppose that Congress contemplated any such effect, would be claimed for its legislation on the subject."

The only right in the property defendants can claim is that given by the treaty of 1867, and that right is· "That a thorough examination and report shall be made under direction of the Secretary of the Interior in order to ascertain the facts relating to all such cases and upon a full examination of such report and hearing of the parties interested, the said Secretary may confirm the said sales or require an additional amount to be paid or declared such sales eutirely void, as the very right of the several cases may require.

This has not been done. No investigation of the property has been made, will a state statute limit or prevent the Secretary of State acting in the matter, could the state of Kansas pass a law and provide the Secretary of Interior act in this matter within a year or any other period. If the Secretary of Interior should now investigate said sale and act upon the same and declare it void, could defendants claim adverse possession in controvention of this act, most certainly not.

As held in the case of Gibson vs. Cloteau 13 Wall. 99, with respect to public domains, The constitution vests in Congress the power of disposition and of making all needful rules and regulations. The power is subject to no regulation, Congress has the sole absolute right to prescribe the times,

the conditions and the mode of transferring the property, or any part of it and to designate the person to whom the transfer shall be made. No State legislation can interfere with this right or embarass its exercise.

* * *

The same principle which forbids any State legislation interferring with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted *by reason of any delay* in the transfer of the title after the initiation proceeding for its acquisition."

The consumation of the title is not a matter the grantees can control, but one which rests entirely within the government. With the legal title when transferred, goes the right to possess and enjoy the land and it would amount to a denial of the power of disposal in Congress if these benefits which should follow upon the acquisition of the title could be forfeited because they were not asserted before that title was issued."

In like manner if the Secretary of Interior should upon investigation as provided in the treaty of 1867, declare the conveyance of Carey Rogers void. These plaintiffs, as heirs of Carey Rogers, would be entitled to enjoy and possess the property in question and no State statute can limit such right.

All of which is respectfully submitted.

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W. M. SPRINGER,
of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

JOHN SCHRIMPSCHER ET AL.,
PLAINTIFFS IN ERROR,

v.

JOHN S. STOCKTON ET AL.,
DEFENDANTS IN ERROR.

No. 19.

In Error to the Supreme Court of the State of Kansas.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

WILLIAM M. SPRINGER,
Attorney for Plaintiffs in Error.

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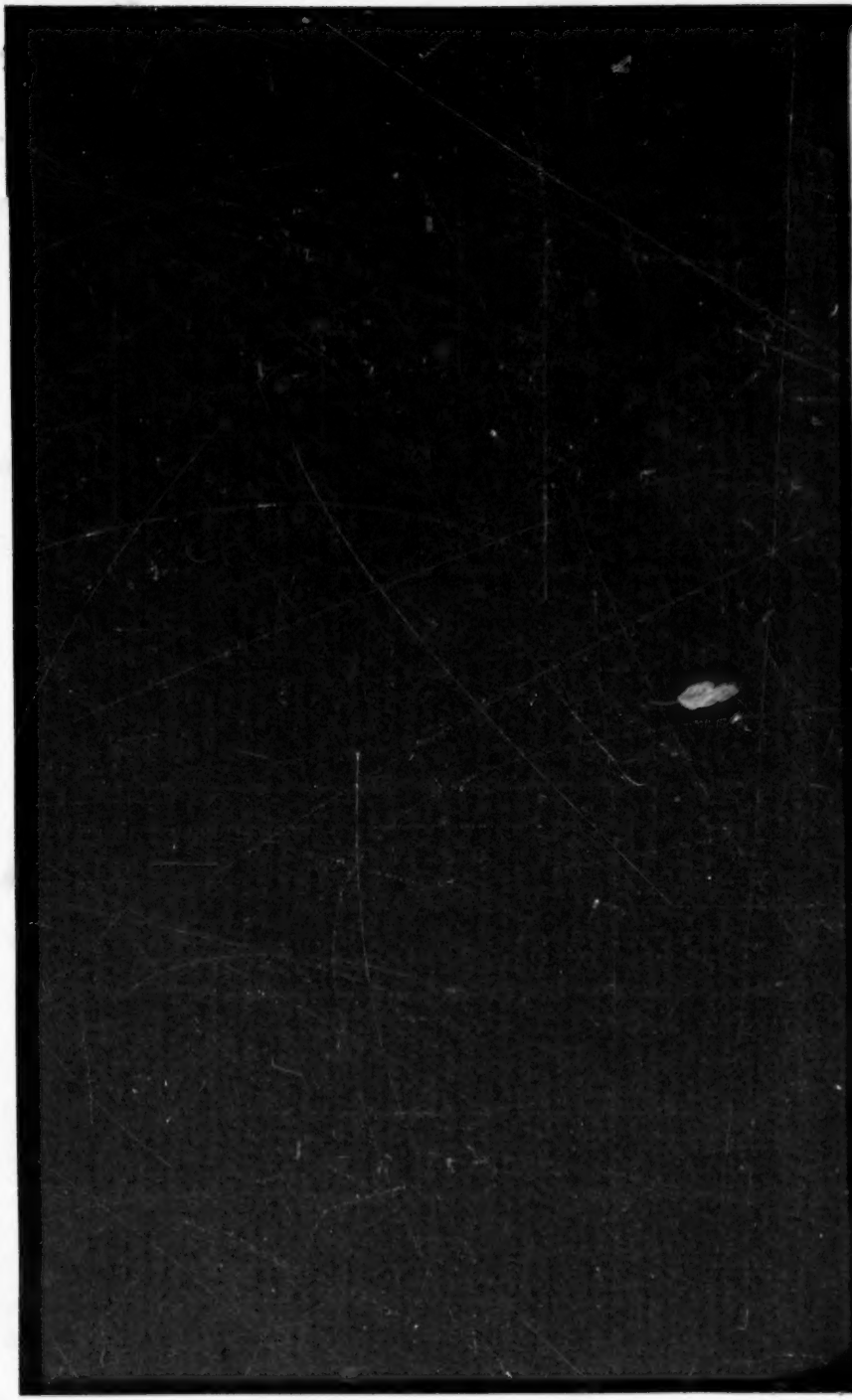

IN THE

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PLAINTIFFS IN ERROR,

v.

JOHN S. STOCKTON, ET AL.,
DEFENDANTS IN ERROR.

No. 19.

Supplemental Brief of Plaintiffs in Error.

ERRATA.

The statement, assignment, and brief of plaintiffs in error filed in this case contains quite a number of typographical errors, some of which will be pointed out and corrected.

In line 2, page 3, the word quite should be quiet.

In line 5, of page 7, the word State should be statute.

In line 8, page 13, the word grantors should be grantees.

In line 14, page 13, the word open should be ripen.

There are other errors which the court will readily perceive and which need not be pointed out.

A Question of Statutory Construction.

The decision of the court in this case will largely turn upon the construction which the court will give to the following provisions in the treaty of 1868:

"Art. 16. All restrictions upon the sale of land assigned and patented to incompetent Wyandottes under the 4th article of the treaty of 1855, shall be removed after the ratification of this treaty, but no sale of lands heretofore assigned to orphans or incompetents shall be made, under decree of any court or otherwise for or on account of any claim, judgment, execution, or order, or for taxes, until voluntarily sold by the patentee or his or her heirs, with the approval of the Secretary of the Interior; and whereas many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855, it is agreed that a thorough examination and report shall be made under direction of the Secretary of the Interior, in order to ascertain the facts relating to all such cases and upon a full examination of such report and hearing of the parties interested, the said Secretary may confirm the said sales or require an additional amount to be paid, or declare such sales entirely void as the very right of the several cases may require."

This Article is divisible into three propositions:

1. The removal of all restrictions upon the sale of land under the treaty of 1855, after the ratification of the treaty of 1868.

2. Inhibition upon sales of allotted lands for taxes.

3. The status of allotted lands which had been sold between 1855 and 1868, the dates of the ratification of the respective treaties.

As to the first proposition, it is evident that it relates to sales of allotted lands thereafter to be made.

It is a well recognized rule of construction that where the intention as to whether a statute is, or is not, retro-

spective is doubtful, it will be construed as prospective only. (Southerland on Stat. Const., Sect. 463.) In this case there is no room for doubt, for there is an expressed intention to make the statute prospective, that is, to take effect only on sales thereafter to be made. The third proposition above stated clearly establishes this fact. The language of that proposition is to the effect that "many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of 1855." This provision relates to lands which had been sold after the ratification of the treaty of 1855, and before the ratification of the treaty of 1868. As such lands had already been sold, in violation of the spirit and intent of the treaty of 1855, the treaty of 1868 very properly and justly placed such lands in a special class, and as to them it was provided, not that the restriction made by the treaty of 1855 should no longer apply, and that sales already made were validated, but that such lands, so sold in violation of the spirit and intent of the treaty of 1855, should be referred to the Secretary of the Interior, for full examination and hearing of the parties interested; and after such examination and hearing, the Secretary was authorized to do one of three things:

First. To confirm the sales.

Second. To require the vendees to pay an additional amount; or,

Third. To declare such sales entirely void as the very right of the several cases may require.

This provision was notice to all concerned that sales of allotted lands by Wyandotte Indians, belonging to the class denominated "not competent," which were made between 1855 and 1868 and not confirmed by the Secretary of the Interior, were made in violation of the spirit and intent of the treaty of 1855, and that the vendees of such sales must

submit their purchases and their deeds to the Secretary of the Interior. Until such persons complied with this reasonable and just provision of a treaty, which was the law of the land, they were regarded by the provisions of the treaty as holding the lands in violation of the spirit and intent of the treaty; or, in other words, unlawfully and fraudulently. Their holdings could only ripen into *bona fide* titles by a compliance with the provisions of the treaty of 1868. Without such compliance, no adverse possession could be set up, and the statutes of limitation of Kansas could not repeal, alter, or modify the Federal treaty. The Federal statute, the treaty of 1868, is still in full force and effect. The vendees of Carey Rogers are still admonished that their title was acquired in violation of the spirit and intent of the treaty of 1855, and that they can acquire no valid title to such land, unless they comply with the provisions of the treaty of 1868. Such vendees have disregarded this admonition. They knew that only $228 had been paid by them for the tract of land now in controversy in this suit (see Record, page 13), and that in 1898 said tract exceeded in value $5,000 (see Record, page 35). Such vendees knew that the Secretary of the Interior would require them to pay to the heirs of Carey Rogers an adequate and just price for such land, and, in default thereof, that the whole transaction would be declared "entirely void."

The duty of making this showing before the Secretary was imposed by law, the treaty of 1868, upon the vendees of Carey Rogers, from whom the defendants in error in this case now hold the land involved in this suit. They have disregarded the law, and now ask this court to condone their unlawful act, and confirm their fraudulent title.

Until the title of the vendees of Carey Rogers to the land in question becomes perfect, as long as anything is required by a Federal statute or treaty to make such title

perfect, such title is inchoate, and partly in the United States. And it is settled that a statute of limitation will not run against the United States, nor can title by adverse possession be acquired as to lands belonging to the United States in whole or in part

The lands in question were conveyed to Carey Rogers by a patent (see Record, pages 12 and 13), which contained this express provision: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being." The court will observe that the restriction as to alienation applied to the grantee and "his heirs." The heirs at law of Carey Rogers are the plaintiffs in this suit, and they cannot now sell it without the consent of the Secretary of the Interior.

The treaty of 1868 did not remove this restriction, or affect this title in any way, except to provide that the grantees of the patentee should submit their title to the Secretary of the Interior. They have not done so. Hence their title remains just as it stood in 1868, the fee being still in the United States, and only a right of occupancy being in the patentee. No State statute of limitation can run as to land held by such a title.

Respectfully submitted.

WILLIAM M. SPRINGER,
Attorney for Plaintiffs in Error.

Supreme Court of the United States.

No. 19.—October Term, 1901.

John Schrimpscher et al., Plaintiffs in Error, vs. John S. Stockton et al. } In error to the Supreme Court of the State of Kansas.

[January 6, 1902.]

This was an action of ejectment brought in the Court of Common Pleas of Wyandotte County, Kansas, by John Schrimpscher and about forty others, heirs of one Carey Rodgers, deceased, a Wyandotte Indian, against John S. Stockton and ten others, to recover a tract of land which had been allotted to certain Wyandotte Indians under the treaty of 1855.

Answers were filed by three of the defendants, containing general denials of the allegations of the petition, and pleas both of a three-year and a fifteen-year State statute of limitations.

To these answers plaintiffs filed a reply to the effect that the ancestor of the plaintiffs, from whom they derived title by descent, was an incompetent Indian, and classed as such under the treaty between the United States and the Wyandotte tribe of Indians, concluded January 31, 1855, and, as such incompetent, was prohibited from alienating any of the lands in controversy, except only the power to lease the same for the term of two years; that defendants and those under whom they claim were bound by the same prohibition, and could have acquired nothing further than such leasehold interest in the land; that defendants occupied such lands in subordination to the rights of plaintiffs' ancestor, and that no notice had ever been brought home to plaintiffs of an adverse claim by defendants.

A jury having been waived and the case submitted to the court, judgment was rendered for the defendants. An appeal was taken to the Supreme Court of the State, which affirmed the judgment of the lower court. (58 Kan. 758.) Whereupon plaintiffs sued out a writ of error from this court.

Mr. Justice Brown delivered the opinion of the Court.

This case turns upon the proper construction of article XV of a treaty with a number of tribes of Indians, including "certain Wyandottes," concluded February 23, 1867, and proclaimed October 14, 1868. (15 Stat. 513, 517.)

The facts of the case are substantially as follows:

On January 31, 1855, (10 Stat. 1159,) the United States entered into a treaty with the Wyandotte Indians, by the *second* article of which they

ceded to the United States certain lands purchased by them of the Delawares, the object of which cession was that "the said lands shall be subdivided, assigned and reconveyed, by a patent, in fee simple, in the manner hereinafter provided for, to the individuals and members of the Wyandotte Nation, in severalty." By the *third* article, provision was made for a survey of the lands, the appointment of commissioners to divide the lands among the individuals of the tribe, and to make up lists of all the individuals and members of the tribe, "which lists shall exhibit, separately, first, those familes, the heads of which the commissioners, after due inquiry and consideration, shall be satisfied are sufficiently intelligent, competent and prudent to control and manage their affairs and interests, and also all persons without families; second, those families, the heads of which are not competent and proper persons to be entrusted with their shares of the money payable under this agreement; and, third, those who are orphans, idiots or insane." Article *four* provided for the issue of unconditional patents in fee simple to those reported by the commissioners to be competent to be entrusted with the control and management of their affairs and interests; "but to those not so competent, the patents shall contain an express condition that the lands are not to be sold or alienated for a period of five years; and not then, without the express consent of the President of the United States first being obtained," &c.

Margaret C. Cherloe was a Wyandotte Indian of the competent class, and as such she was given, under the treaty of 1855, allotment No. 42, to sixty-four acres of the land originally sued for, and received a patent therefor in fee simple, without restriction as to conveyance. This patent was dated June 1, 1859.

After the issue of such patent, and prior to August 31, 1863, Margaret C. Cherloe died intestate, leaving her grandson, Carey Rodgers, as her only heir at law, and on August 31, 1863, the said Carey Rodgers made a deed in fee simple of the land so inherited to Jesse Cooper and Mary E. Stockton.

Carey Rodgers, being himself a Wyandotte Indian, belonging to the incompetent class by reason of being an orphan, was given allotment No. 278, containing fifty-seven acres, and on September 1, 1859, received a patent for said lands, containing the following condition: "That the said tract shall never be sold or conveyed by the grantee or his heirs without the consent of the Secretary of the Interior for the time being, and with the further and express condition, as specified in the fourth article of the treaty with the Wyandottes of the 31st of January, 1855, that the lands are not to be sold or alienated for a period of five years."

On November 15, 1864, the said Carey Rodgers executed a deed in fee simple of this last-mentioned land to Jesse Cooper and Mary E. Stockton, covenanting that he was seized in fee simple and had good right to sell the same.

On February 25, 1869, by a partition of that date by Jesse Cooper and his wife, and Mary E. Stockton and her husband, there was conveyed to Mary E. Stockton the lands sued for in this action and described in the petition. Defendants took title from her.

The said Carey Rodgers died intestate in December, 1867, at the age of 21.

Immediately after the execution of the deeds from Carey Rodgers to Jesse Cooper and Mary E. Stockton the grantees took possession of all the land described in said deeds under claim of title and ownership by virtue of said deeds; made permanent improvements thereon, and they and their grantees have had and held open, undisturbed and adverse possession of all of said lands, claiming title thereto, paid all taxes, cleared the land of timber, and cultivated the same as tenants.

In the years 1891 and 1892 there was a kind of occupancy of part of the land by persons claiming under the plaintiffs, but that does not seem to have been treated as material.

Carey Rodgers thus become possessed of two tracts of land, one of sixty-four acres as the heir at law of his grandmother, Margaret C. Cherloe, and the other of fifty-seven acres as a personal allotment to himself. As plaintiffs state that a settlement of the case has been made so far as relates to the Cherloe tract, we shall dismiss that tract from our opinion. The deed of Carey Rodgers' own allotment of November 15, 1864, was clearly void, since as to this contract, at least, he was incompetent, and took under a patent which provided that the land should never be sold or conveyed by the grantee or his heirs, without the consent of the Secretary of the Interior. If the case stood upon defendants' rights under this deed alone, there could be no doubt whatever that Rodgers' heirs were entitled to the land.

But on February 3, 1867, another treaty was concluded (proclaimed October 14, 1868) with several tribes of Indians, among which were "certain Wyandottes," (15 Stat. 513,) the fifteenth article of which was as follows:

"ART. 15. All restrictions upon the sales of lands assigned and patented to 'incompetent Wyandottes' under the fourth article of the treaty of one thousand eight hundred and fifty-five, shall be removed after the ratification of this treaty; but no sale of lands heretofore assigned to orphans or incompetents shall be made under decree of any court, or otherwise, for or on account of any claim, judgment, execution or order, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of Interior; and whereas, many sales of land belonging to this class have heretofore been made contrary to the spirit and intent of the treaty of one thousand eight hundred and fifty-five, it is agreed that a thorough examination and report shall be made under directions of the Secretary of the Interior, in order to ascertain the facts relating to all

such cases, and upon a full examination of such report, and hearing of the parties interested, the said Secretary may confirm the said sales, or require an additional amount to be paid, or declare such sales entirely void, as the very right of the several cases may require."

This article makes the following distinct provisions:

1. It removes all restrictions upon the sales of lands patented to incompetent Wyandottes, which should thereafter be made.

2. It provides that no sales of lands theretofore assigned to incompetents shall be made under any legal proceedings, or for taxes, until voluntarily sold by the patentee or his heirs, with the approval of the Secretary of the Interior.

3. That, as to lands theretofore sold by incompetents in violation of the treaty of 1855, a thorough examination and report shall be made under the directions of the Secretary of the Interior, in order to ascertain the facts relating to such cases, and upon examination of such report and a hearing of the parties, the Secretary may confirm such sales, require an additional amount to be paid, or declare the sales void.

No action was ever taken under the third clause to procure a confirmation by the Secretary of the Interior of the deed by Rodgers of November 15, 1864, so that, at the time the treaty of 1868 was ratified, the possession of the lands was in the defendants or their grantors holding adversely to the heirs of Rodgers, but the title still remained in such heirs by reason of the fact that his deed to Cooper and Stockton was void, and no proceeding had been taken under the third clause of Art. XV to confirm or validate it. But although the treaty of 1855 and the patent to Rodgers had expressly provided that there should be no alienation by the grantee *or his heirs*, the treaty of 1868, which took effect after his death, removed all restrictions upon alienations which should thereafter be made, either by the incompetent grantee Rodgers, or his heirs, who thereafter held an alienable title, and were bound to assert such title within the time specified by the statute of limitations, although no title could be gained by adverse possession so long as the land continued to be inalienable by Rodgers and his heirs. (*McGannon* v. *Straightlege*, 32 Kan. 524; *Sheldon* v. *Donoh.ue*, 40 Kan. 346.)

Their disability terminated with the ratification of the treaty of 1868. The heirs might then have executed a valid deed of the land, and possessing, as they did, an unincumbered title in fee simple, they were chargeable with the same diligence in beginning an action for their recovery as other persons having title to lands; in other words, they were bound to assert their claims within the period limited by law. This they did not do under any view of the statute, (whether the limitation be three or fifteen years,) since it began to run at the date of the treaty, 1868, and the action was not brought until 1894, a period of over twenty years.

Plaintiffs, however, seek to avoid the effect of the statute by insisting, first, that statutes of limitations do not run against Indians; second, that defendants were not in possession under color of title, and therefore the statute is not available to them; third, that no title by limitation could be acquired as against the right of the Secretary of the Interior to investigate and declare the conveyance in question to be void, and hence the statute would not begin to run until after such action by the Secretary.

1. Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix* v. *Patrick*, (145 U. S. 317, 330;) *S. C.*, 36 Fed. Rep. 457, 461; *Swartzel* v. *Rogers*, (3 Kan. 374;) *Blue Jacket* v. *Johnson Co.*, (Ibid. 299;) *Wiley* v. *Keokuk*, (6 Kan. 94;) *Ingraham* v. *Ward*, (56 Kan. 550,) they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty. Now, the very first article of the treaty of 1855 provides: "Art. 1. The Wyandotte Indians having become sufficiently advanced in civilization, and being desirous of becoming citizens, it is hereby agreed and stipulated that their organization and relations with the United States, as an Indian tribe, shall be dissolved and terminated on the ratification of this agreement; except so far as the further and temporary continuance of the same may be necessary in the execution of some of the stipulations herein; and from and after the date of such ratification, the said Wyandotte Indians, and each and every of them, except as hereinafter provided, shall be deemed, and are hereby declared to be citizens of the United States, to all intents and purposes; and shall be entitled to all the rights, privileges and immunities of such, citizens; and shall in all respects be subject to the laws of the United States, and of the Territory of Kansas, in the same manner as other citizens of said territory; and the jurisdiction of the United States, and of said territory shall be extended over the Wyandotte country in the same manner as other parts of said territory." There was an immaterial exception not necessary to be noticed here.

It seems, however, that this provision did not prove entirely satisfactory to some of the Indians, who regretted their emancipation and the loss of the protection of the government, and in the treaty of 1868 there was incorporated in the preamble a recital that "a portion of the Wyandottes, parties to the treaty of 1855, although taking lands in severalty, have sold said lands, and are still poor, and have not been compelled to become citizens, but have remained without clearly recognized organization, while others who did become citizens are unfitted for the responsibilities of citizenship; and . . . have just claims against the government, which will enable the portion of their people herein referred to begin anew a tribal existence;" therefore it was agreed by article *thirteen* that the

United States would set apart for the Wyandottes certain land ceded by the Senecas, in order to provide for these Indians, and would make a register of all who declare their desire to be and remain Indians in a tribal condition, who should thereafter constitute the tribe.

It is sufficient to say of this that it could not apply to Carey Rodgers personally, since he died before the treaty was ratified; and there is no evidence that his heirs ever elected to resume their tribal relations and to become again members of the incompetent class. As Article XV removed all restrictions upon the sale of lands by incompetents, if the heirs of Carey Rodgers took the position that the article did not apply to them, they assumed the burden of proving that fact.

2. Plaintiffs' assertion, that defendants were not in possession under color of title, is untenable. They had taken possession under a deed executed by Rodgers, November 14, 1864, which was valid upon its face, made by one having title to the land, and in which the grantor covenanted that he was seized in fee simple, had good right to sell the same, that it was free from encumbrance, and that he would warrant and defend the title unto the grantees against the claims of all persons. The court finds that the defendants and their grantors acted in good faith in making the purchase of said lands and in taking this deed, by which we understand that they paid a valuable consideration, and had no actual notice of any defect in the title of their grantor. It is true that if the grantees had examined the Rodgers patent they would have discovered the restraint upon his alienation of the land; but it is too much to say that a deed valid upon its face, and taken in good faith for a valuable consideration, without actual notice of the facts, does not give color of title. Color of title was defined by this court in *Wright* v. *Mattison*, (18 How. 50, 56,) "to be that which in appearance is title, but which in reality is no title." Said Mr. Justice Daniel: "The courts have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title, under which an entry or a claim has been made in good faith." See also *Beaver* v. *Taylor*, (1 Wall. 637;) *Cameron* v. *United States*, (148 U. S. 301, 307.) There was no evidence in this case, except from the patent, that the grantees even knew that Rodgers was an Indian, as was the case in *Taylor* v. *Brown*, (5 Dakota, 344,) much less that he belonged to the incompetent class, and they apparently received the deed, as many people do, without a careful examination of the grantor's title. In Kansas possession without paper title seems to be sufficient. (*Gilmore* v. *Norton*, 10 Kan. 491; *Anderson* v. *Burnham*, 52 Kan. 454.)

The cases cited by the plaintiffs in support of their proposition, that the deed from Rodgers did not constitute color of title, are those wherein

there was an element of fraud, or want of good faith, which are expressly negatived by the finding of the court in this case. (*Livingston* v. *Peru Iron Co.*, 9 Wend. 511.)

3. That no title could be acquired against the right of the Secretary to declare the deed void, and hence the statute would not begin to run until after such action by the Secretary of the Interior. The case of *Gibson* v. *Chouteau*, (13 Wall. 92, 99,) is relied upon to sustain this proposition. In that case it was held that the occupation of lands derived from the United States under a new Madrid certificate, before the issue of a patent, for the period prescribed by the State statute of limitations, was not a bar to an action in ejectment for the possession of such lands, founded upon the legal title subsequently conveyed by the patent; nor did such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed. Obviously this case has no application to the one under consideration. Here the United States had issued a patent to Rodgers "and to his heirs and assigns forever," subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make.

We have considered all the points taken by the plaintiffs, and are of the opinion that they are not sustained; that the judgment of the Supreme Court of Kansas was right, and it is therefore

Affirmed.

Mr. Justice WHITE and Mr. Justice MCKENNA dissented.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE